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REPORTS

OF

Cases in Law and Equity

DETERMINED IN THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

BY OLIVER L. BARBOUR, LL. D.

VOL. XXXIX.

ALBANY:

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W. C. LITTLE LAW BOOKBINDER

1863

JUSTICES OF THE SUPREME COURT,

DURING THE YEAR 1863.

FIRST JUDICIAL DISTRICT.

- CLASS 1. JOSIAH SUTHERLAND.*
" 2. DANIEL P. INGRAHAM.
" 3. WILLIAM H. LEONARD.
" 4. GEORGE G. BARNARD.
" 5. THOMAS W. CLERKE.

SECOND JUDICIAL DISTRICT.

- " 1. JAMES EMOTT.†
" 2. JOHN W. BROWN.*
" 3. WILLIAM W. SCRUGHAM
" 4. JOHN A. LOTT.

THIRD JUDICIAL DISTRICT.

- " 1. GEORGE GOULD.*
" 2. HENRY HOGEBOOM.
" 3. RUFUS W. PECKHAM.
" 4. THEODORE MILLER.

FOURTH JUDICIAL DISTRICT.

- " 1. ENOCH H. ROSEKRANS.†
" 2. PLATT POTTER.*
" 3. AUGUSTUS BOCKES.
" 4. AMAZIAH B. JAMES.

JUSTICES OF THE SUPREME COURT.

FIFTH JUDICIAL DISTRICT.

CLASS 1. WILLIAM F. ALLEN.*

" 2. JOSEPH MULLIN.

" 3. LE ROY MORGAN.

" 4. WILLIAM J. BACON.

SIXTH JUDICIAL DISTRICT.

" 1. RANSOM BALCOM.†

" 2. WILLIAM W. CAMPBELL.*

" 3. JOHN M. PARKER.

" 4. CHARLES MASON.

SEVENTH JUDICIAL DISTRICT.

" 1. ERASMUS DARWIN SMITH.*

" 2. THOMAS A. JOHNSON.

" 3. JAMES C. SMITH.

" 4. HENRY WELLES.

EIGHTH JUDICIAL DISTRICT.

" 1. RICHARD P. MARVIN.†

" 2. NOAH DAVIS, JUN.*

" 3. MARTIN GROVER.

" 4. JAMES G. HOYT.

DANIEL S. DICKINSON, *Attorney General*.

*Presiding Justice.

†Sitting in the Court of Appeals.

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CASES
IN
Law and Equity
IN THE
SUPREME COURT
OF THE
STATE OF NEW YORK.

THE PEOPLE, *ex rel.* Elston and others, *vs.* CHARLES S.
ROBERTSON.

An under-lease, by the lessee of premises, for the whole unexpired term, reserving the right to re-enter, is a sub-lease and not an assignment, and the party giving the sub-lease can re-enter for a breach of the condition, although there is no reversion remaining in him.

A lease was for the term of ten years, to commence on the 1st day of May, 1852, and to end *on the 1st day of May*, 1862. W., the assignee of the lessee, underlet the premises to E. from the 1st day of May, 1856, to *the 1st day of May*, 1862. W. then assigned the original lease to R. *Held* that the original lease was to be construed as expiring at 12 o'clock M. of the 1st of May, 1862, and the sub-lease as expiring at 12 o'clock at night of the 30th of April, 1862. And that consequently there was a period of time between the end of the 30th of April and 12 M. of the 1st of May, during which R. had the right of re-entry and of possession of the premises.

CERTIORARI to the justice of the first district court of the city of New York, to bring up summary proceedings commenced before him by the respondent, to remove

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the relators from certain premises in the city of New York, for non-payment of rent.

William E. Dunscomb, on the 2d day of February, 1852, leased the premises to Ira Wood, for the term of ten years, to commence May 1, 1852, and to end May 1, 1862, at the yearly rent of \$900, payable quarterly. Ira Wood subsequently assigned and set over said lease to James Wood, who became the assignee of the lease of the whole of said premises, and was the owner of the whole unexpired term of said lease. James Wood leased to the relators, D. D. Elston and James Wickham, the whole of said premises from May 1, 1856, to May 1, 1862, (the end of the term,) at the yearly rent of \$1200, payable quarterly, and they have ever since held and occupied the same under said agreement. James Wood, on the 3d day of April, 1856, assigned, transferred and set over the said lease to John F. Robertson. John F. Robertson, on the 28th day of April, 1859, assigned, transferred and set over said lease to Charles S. Robertson, the respondent. Elston and Wickham paid rent to Charles S. Robertson from April, 1859, to February 1, 1861. The rent which fell due May 1 and August 1, 1861, had not been paid, and Charles S. Robertson had demanded the same of Elston. The respondent stated in his affidavit, that said Elston and Wickham, and their under-tenants or assigns, held over and continued in possession after such demand, without the permission of the landlord. On these facts, Justice Stewart issued a summons returnable October 19, 1861, at which time the said Elston and others appeared and moved to dismiss the proceedings, on the ground that the instrument from James Wood to Elston and Wickham operated as an assignment of Wood's interest in the premises, and not as an under-lease; and that by such assignment James Wood parted with all his interest in the premises, and could not, nor did he convey any to John F. Robertson; and that John F. Robertson had no interest in the premises to assign to Charles S. Robertson, the applicant, and therefore he could not dispossess. The justice

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denied the motion, and rendered a judgment in favor of the landlord that he have possession of the premises by reason of the non-payment of the rent, and that a warrant issue to remove the tenants and all persons from the said premises, and to put the landlord in full possession.

G. O. Hulse, for the relators. I. The justice should have dismissed the proceeding on the objection of Elston and Wickham. (1.) The instrument described in the affidavit of James Robertson, from James Wood to Elston and Wickham, operated as an assignment of all the estate which Wood then had in the premises. There was no reversionary interest left in Wood, and he could not dispossess for non-payment of rent. (*Woodfall's Landlord and Ten.* 16, 345, 346, 358. *Taylor's Land. and T.* §§ 16, 424, 431, 443, 448. *Bacon on Leases*, 128. 4 *Kent's Com.* 96. *Douglas*, 186, 7. *Hicks v. Downing*, 1 *Ld. Raym.* 99. *Wollaston v. Hakewill*, 42 *Eng. Com. L. Rep.* 297. *Childs v. Clark*, 3 *Barb. Ch.* 59 *et seq.* 23 *Eng. Com. L. Rep.* 147. *Van Rensselaer v. Gallup*, 5 *Denio*, 454 *et seq.* 6 *Hill*, 314.) (2.) James Wood was no longer liable for rent to the original lessor. (*Woodf. Land. and Ten.* 350, 353.) (3.) Elston and Wickham are liable to the original lessor for the rent during their occupation, after taking the assignment. (*Woodf.* 348, 417, 418. *Taylor*, § 444. 18 *Barb.* 608. (4.) An assignee of a lessee, after he has parted with all the remaining term, estate and interest in the thing leased, has no reversion left in the term or estate, and cannot sue for rent unpaid, nor have ejectment for possession. (*Taylor's L. and Ten.* § 444, 447 *and cases*; 449, 452, 453. 3 *Kent*, 464. 4 *Eng. C. L. Rep.* 214. 1 *Ld. Raym.* 99. *Woodf.* 346, 348, 350, 358, &c. 7 *Wend.* 467. 20 *id.* 103. 6 *Hill*, 314.) (5.) The excess of rent over that in the original lease is no part of the term; it is rent-seck, or barren-rent, without the right to distrain therefor; and where the distrainor has no reversion in the land, rent due can be collected only by an action. (3 *Kent*, 577. *Thorne v. Wooll-*

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combe, 23 *Eng. Com. L. Rep.* 147. *Taylor's Land. and T.* § 370. *The People v. Haskins*, 7 *Wend.* 467.)

II. The allegation of payment of rent by the relator to the applicant, does not sustain the proceedings. (6 *Hill*, 314. *Davis, receiver, v. Morris & Hudson*, opinion of this court, Nov. general term, 1861.)

Warren G. Brown, for the respondent. I. The affidavit on which these proceedings are founded, expressly alleges that James Wood "let and leased" to Elston and Wickham, and they took the premises "as tenants." "And have ever since continued to hold and occupy said premises as such tenants by virtue of said agreement." Besides, Elston and Wickham paid rent to this defendant as their landlord, under this lease, for eight quarters. And yet, in view of all these uncontradicted facts, the court is asked to hold that this instrument was an assignment which all the parties intended should be an under-lease, and understood was an under-lease. We have also in this uncontradicted affidavit, the statement that the respondent Charles S. Robertson is the landlord of Elston and Wickham, and that he owns and has owned said lease since 28th of April, 1859. (*Estate of Norsworthy v. Bryan*, 33 *Barb.* 153.)

II. All these express and uncontradicted statements must surely prevail to show that the instrument from James Wood to Elston and Wickham was in fact and in law what it purports to be on its face—an under-lease—unless its termination on the same day as the original lease necessarily makes it an assignment, whatever may be the conditions, covenants, limitations or provisions of the instrument in question. Now *Post v. Kearney* (2 *Comst.* 394) is a case precisely in point, to show that an assignee of a lessee remains such assignee, and is thus liable on covenants running with the land, although he has sublet for the whole period of his unexpired term. In that case the court say: "The lease between the parties is in the usual form, with covenants by the lessee for

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the payment of rent and for the surrender of the premises at the close of the term in good order and condition. Shepard did not hold the premises as assignee, but as the under-tenant of the defendant." (*Page 396. Taylor's Land. and Ten. § 426 ; Id. § 16. Williams v. Hayward, 5 Jurist, (U. S.) 1859, p. 1417. Clarke v. Coughlan, 3 Irish Law Rep. 427. 1 Sand. S. C. Rep. 105-9.*) The court will presume in favor of the truth of the averments in the affidavits, and not presume them false. The affidavit states explicitly that the instrument in question is an under-lease, and the court of appeals say the under-lease may expire on the same day as the original lease. How can this court say that this lease does not contain this very provision for the surrender of the premises at the close of the term?

III. The relators might, by putting in a counter affidavit, have denied the making of the under-lease, and that "the said Elston and Wickham, therein and thereby, as tenants of the said James Wood, took the whole of said premises." And the other facts showing it to be such, and then the production of the lease itself, would have raised the question, undertaken to be raised here. The affidavit of the conveyance of a piece of real estate, or of the making of a will or lease, is always made in this form; no one ever sets out the words of the instrument itself. It is enough here to say that the instrument is sworn to be an under-lease, and that the fact has not been put in issue, as authorized by law; and, therefore, the relators are not in a position to dispute that fact. (*Matter of Norsworthy v. Bryan, 33 Barb. 153.*)

IV. The tenants, Elton and Wickham, paid to the respondent rent of these premises from April 28, 1859, to February 1, 1861, inclusive. And from these payments the court will presume an agreement, and, of course, the relation of landlord and tenant, which would sustain these proceedings without any thing else. (*McFarlan v. Watson, 3 Comst. 286.*) It would be binding at least until the 1st of May next after the last payment of rent. (*2 R. S. 29, § 1, 3d ed.*) A ten-

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ant at will, or at sufferance, may be removed under these proceedings. (2 R. S. 603, § 28, 3d ed.)

V. If the respondent had not authority to turn the relators out for non-payment of rent, then nobody could. The under-lease was made to Elston and Wickham; they agreed to and did pay rent, and were in possession for five years. Now who could turn them out for non-payment of rent? Not James Wood; for he had assigned certainly his right to the rent, to Robertson, (this respondent,) and the relators claim that Robertson could not dispossess them for non-payment of rent. In this way Elston, who is and was in fact insolvent, could occupy to the end of his lease without paying any body. (*Williams v. Hayward*, 5 *Jurist*, N. S. 1859, p. 1417. *Clarke v. Coughlan*, 6 *Irish Law Rep.* 427.)

VI. A tenant cannot deny the title of his landlord. By paying rent under this lease to the respondent as his landlord, they recognized him as such, and after that he certainly cannot deny the title of his landlord, which carries with it the right to institute these proceedings. (*Ingraham v. Baldwin*, 5 *Seld.* 45. 3 *Wend.* 339. 7 *id.* 401. 7 *Cowen*, 717.)

VII. But, in fact, the term of the original lease from Dunscombe to Ira Wood, which was assigned to James Wood, extended one day longer than the under-lease, from James Wood to Elston and Wickham. The original lease from Dunscombe to Ira Wood, was "to commence on the 1st day of May, 1852, and to end on the 1st day of May, 1863," and obviously includes both days. The under-lease from James Wood to Elston and Wickham was "to the 1st day of May, 1862," which would not include that day, though it may be extended to 12 o'clock at noon of that day, on proof of a usage to that effect, in the place where the property is situated. (*Wilcox v. Wood*, 9 *Wend.* 346.)

By the Court, INGRAHAM, J. The relators complain of the decision of the justice, in this case, on the ground that the respondent had no title in the land which would enable

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him to obtain possession thereof for non-payment of rent, under the statute.

One James Wood had a lease of the premises, which had been assigned to him. This lease was not put in evidence. The affidavit on which the proceedings were founded stated that the lease was for ten years, to commence on the 1st day of May, 1852, and *to end on the 1st day of May, 1862.* While holding this lease, Wood underlet to the relators the premises from the 1st day of May, 1856, *to the 1st day of May, 1862.* After this lease, Wood assigned the original lease to John F. Robertson, who assigned to the respondent. After the assignment the relators paid rent to the respondent, as landlord. This proceeding was to obtain possession of the premises, for the non-payment of rent. The main question in the case is, whether the under-lease operated as an assignment of all the interest of Wood in the premises.

In *Post v. Kearney*, (2 N. Y. Rep. 394,) it was held that an under-lease by the lessee of premises, for the whole unexpired term, which contained a covenant to pay rent and surrender the possession of the demised premises at the end of the term, to the original lessee, did not operate as an assignment, but as an under-lease. The same was held in *Piggot v. Mason*, (1 Paige, 412.) And in *Linden & Fritz v. Hepburn*, (3 Sandf. S. C. Rep. 668,) the court held that such an under-lease reserving the right to re-enter was a sub-lease, and not an assignment, and that the parties giving the under-lease could re-enter for a breach of the condition, although there was no reversion remaining in them. (See also *Doe ex dem. Freeman v. Bateman*, 2 B. & Ald. 168.)

Even if the rule were otherwise, the facts in this case are not so proven as to enable the relators to avail themselves of it. They have seen fit to rely on the statements in the affidavit, without putting in evidence the leases on which the question arises. By this affidavit it appears that the original lease expired on the 1st of May, 1862. This would be construed as expiring at 12 o'clock of that day. The under-lease

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is stated to be from the 1st of May, 1856, to the 1st of May, 1862. This would expire at 12 o'clock at night of the 30th of April; and there is in fact a period of time between the end of the 30th of April and 12 M. of the 1st of May, during which the respondent had the right of re-entry and of possession of the premises.

Under either view of the question, the respondent is entitled to judgment.

[NEW YORK GENERAL TERM, November 24, 1862. *Ingraham, Leonard and Barnard*, Justices.]

THE CUMBERLAND COAL AND IRON COMPANY vs. THE HOFFMAN STEAM COAL COMPANY and others.

The want of jurisdiction of the court over the subject matter of the action will not prevent the defendant from recovering costs, on the dismissal of the complaint; nor will it deprive the defendant of the right to damages upon the injunction-undertaking, when the injunction is dissolved. LEONARD, J. dissented.

The undertaking given on the issuing of an injunction is for the benefit of all the defendants that are enjoined, whether served or not. Hence, if a party, without any service of the summons or injunction upon him, obeys the injunction, he may, without any appearance, have a reference to ascertain the amount of damages sustained by him, by reason of the injunction. LEONARD, J. dissented.

THIS was an appeal by the plaintiff from an order entered on the 23d day of January, 1862, granting a reference to Samuel Jones, Esq. to ascertain and report the amount of damages alleged to have been sustained by the defendant, The Hoffman Steam Coal Company, by reason of an injunction issued in this case.

The action was commenced against the defendants Sherman and Dean, on or about the 19th day of November, 1858, for the purpose of setting aside a certain conveyance of lands of the plaintiff, situate in Maryland, and a certain transpor-

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tation contract made by the plaintiff, to and with the defendants Sherman and Dean, while the said Sherman was one of the directors of the plaintiff, which conveyance and contract are alleged in the complaint to have been procured by fraud. The Hoffman Steam Coal Company is a corporation, created by a statute of the state of Maryland, and was named in the complaint in this action as a defendant, by reason of a conveyance and transfer of said lands and transportation contract, made by said Sherman and Dean to said The Hoffman Steam Coal Company. A temporary order of injunction was made herein by his Honor Judge Davies, restraining the defendants from interfering with the lands in question, and from disposing of said transportation contract, and requiring the defendants to show cause why such injunction should not be continued. That order was duly served on the defendants Sherman and Dean, who appeared in the action, and a copy of the summons and complaint, together with a copy of said order was served upon S. Brooke Postley, the president of the said The Hoffman Steam Coal Company, on the 19th of November, 1858. The section of the code relative to the mode of serving a summons, (§ 134,) as it stood at that time, required a copy, in case of a suit against a corporation, to be delivered to the president or other head of the corporation, &c.; but in case of a foreign corporation such service could be made only *when it had property* within this state, or the *cause of action arose here*. The Hoffman Steam Coal Company had no property in this state at the time, and the cause of action did not arise here. Consequently the service was void. The Hoffman Steam Coal Company did not appear in this action, but moved to set aside the said service upon them, upon the grounds: 1st. That said company had not been lawfully served with said summons and complaint, and had not appeared in this cause. 2d. Because said plaintiff and defendant, The Hoffman Steam Coal Company, were not residents of the state of New York,

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and the cause of action did not arise, and the subject matter of the action was not situated in this state. 3d. Because the said The Hoffman Steam Coal Company had no property within this state. That motion was argued before his Honor Judge Sutherland, and on the 20th day of December, 1858, an order was made by him thereon, granting said motion, and setting aside and absolutely vacating the service of said summons, complaint and injunction, as against the said The Hoffman Steam Coal Company. That motion was granted on the ground that such service was absolutely void and of no effect, not being within the provisions of section 134 of the code as it then stood. The plaintiff appealed to the general term of this court from the said order of Judge Sutherland, and the same was affirmed. No service of the summons or injunction had been made on said company or any officer thereof since the amendment in 1859, of section 134 of the code. The Hoffman Steam Coal Company alleged that from the time of the service of the injunction order as aforesaid, until after the determination of the plaintiff's appeal to the general term, *i. e.* from November 19, 1858, until after May 25, 1859, it rigidly obeyed the injunction order, and carefully refrained from doing any act that might possibly be construed into a disobedience thereof, as the company was advised it was bound to do, even though the injunction was improperly made, until the same was set aside by judicial action of the court. And that the said injunction completely stopped and stayed all the business of The Hoffman Steam Coal Company, then in a flourishing condition, at an enormous and irreparable loss to it, as was alleged.

Charles A. Rapallo, for the appellant.

L. R. Marsh, for the respondent.

INGRAHAM, P. J. The want of jurisdiction of the court over the subject matter of the action did not prevent the

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defendant from recovering costs, on the dismissal of the complaint; nor does it deprive the defendants of the right to damages upon the undertaking given on the issuing of the injunction, when it was dissolved. The court had sufficient jurisdiction over the parties to commence the action, although there was none over the subject matter. And in such a case I can see no reason why the defendants should not have the benefit of the undertaking filed for that purpose. The plaintiff is estopped from denying jurisdiction. (2 *Sand. S. C. Rep.* 81.)

The only question is, whether a defendant who obeys an injunction before the process is served, may have such relief. I think he may, if he obeys the injunction. It has been held that it is the duty of the defendant to obey an injunction, if he knows it has been granted, although it has not been served; and if he disobeys it, he will be liable to an attachment. The injunction is granted before service of process, often, and the undertaking when filed, in such a case, is for the benefit of all the defendants that are enjoined, whether served or not.

The order should be affirmed, with costs.

BARNARD, J. concurred.

LEONARD, J. I dissent. The Hoffman company, not having appeared in the action, is not entitled to any costs. I think that company cannot, without service of process, volunteer to come into court, so as to claim the benefit of the undertaking, without full appearance in the action; unless there had been service of the injunction. The court was also without jurisdiction of the parties or of the action, so far as the Hoffman Company was concerned. This defendant is a foreign corporation. The plaintiff does not reside in this state, and the cause of action did not originate here. (*Code*, § 427.) The injunction was void; not merely

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voidable. And the court was without jurisdiction to make the order of reference, or any other order affecting the Hoffman company. (*The People v. Sturtevant*, 9 N. Y. Rep. 266.)

Order affirmed.

[NEW YORK GENERAL TERM, November 24, 1862. *Ingraham, Leonard and Clarke*, Justices.]

DANIEL MORGAN, *appellant*, vs. SARAH E. MORGAN, a minor, and THOMAS BUCHANAN, jun. her general guardian, *respondents*.

It is not an inflexible rule that the commissions of a guardian cover every thing which can be allowed to him for his services respecting the estate of his ward.

The rule is fairly deducible from the cases that where extra compensation has been applied for and denied, the services for which such remuneration was asked were strictly within the official duties of the executor, guardian or trustee; and that no other recompense can be allowed than such as the statute provides for conducting the administration of the estate in all that legitimately pertains to it.

But the rule is not so narrow and restricted that it denies all compensation to a guardian for services of a personal or professional nature, rendered by him for the benefit of the ward, and in doing which he has bestowed personal labor, and incurred actual expenses, and which have been useful and serviceable to the estate. MORGAN, J. dissented.

THIS is an appeal from a decision of the surrogate of the county of Oneida, rejecting certain items in the account of Daniel Morgan, late general guardian of Sarah E. Morgan. Daniel Morgan was appointed the general guardian of Mary Jane Morgan and Sarah E. Morgan, minors, and the children of his deceased brother, in August, 1851, and continued such guardian of Mary Jane until her death in 1855, and of Sarah E. until February, 1859, at which time, she having become fourteen years of age, and peti-

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tioning therefor, Thomas Buchanan, jun. was appointed her general guardian. Daniel Morgan was the administrator of the estate of his brother, and the minor Mary Jane died unmarried and intestate, and her estate therefore descended to her sister. The estate of these minors consisted of about thirty building lots in the city of Utica, on which were seven wooden dwelling houses, of which six were of good size and desirable as residences, being located on West and Miller streets, and yielded an average rent of about \$125 each, per annum. The other dwelling house was a wooden tenement in West Utica, of inferior description, and produced a much smaller rent. The property was under considerable incumbrance, a part of which was paid by a sale of some of the vacant lots under an order of the supreme court, and the interest on the balance was paid from the income of the part remaining unsold. During the guardianship of Morgan these houses needed and received very extensive general repairs, besides the small ordinary and annual repairs incident to that kind of property. All this work was done under the personal supervision of the guardian, who also personally collected the rents, settled and paid all bills, both in reference to the property and the support and education of the minors. In pursuance of an order of the supreme court, a building was erected upon two of the vacant lots; the accounts for the expenses attending this improvement were for the most part rendered to the supreme court, but some of the items were carried into the last part of the guardian's account to the amount of \$278.10, and so appeared at the hearing before the surrogate; but by an arrangement made between the parties before the decree was made, these items were deducted, thus reducing by that amount the balance claimed by the guardian to be due to him. The guardian himself performed considerable mechanical labor on the property, and paid sundry small items of expenses connected therewith, and for this labor, and these expenses, he made charges in the accounts which he rendered from year

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to year, which charges were examined and adjusted by the surrogate as they were annually presented. These accounts so adjusted were as follows :

For 1853,	\$25 00
" 1854,	121 09
" 1855, . . . \$100.23—\$35.25,	64 98
" 1856,	104 05
" 1857,	50 00
" 1858,	50 00
Total,	<u>\$415 12</u>

Before adopting this practice, the guardian presented the matter to the surrogate of the county, who after examination of the property and the facts of the case, directed the guardian to pursue this course, and instructed him to make such small repairs as were necessary and as he could do himself with economy and advantage, and present with his annual accounts, detailed statements of what he might do, and the time he might be employed in making such repairs. When the case came before the present surrogate for final settlement, he regarded these charges as illegal, and rejected them on the ground that the compensation of the guardian was confined to his commissions, which covered every kind of service which a guardian, executor or administrator could bestow upon the estate committed to his care. The surrogate also modified other parts of the accounts in such manner that the account against the guardian was increased to the amount of \$120.39. A final decree was made by the surrogate, by which a balance of \$25.35 was found due to the guardian, and no costs were awarded to either party. From this decree the late guardian appealed to the supreme court, and the counsel of the respective parties by their stipulation provided for the omission from the return of the surrogate of such parts of the proceedings and evidence as

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were not necessary for the decision of the issues raised by the appeal and answer.

O. S. Williams, for the appellant. I. The charges for the labor and services of the guardian and for small items of expenses paid by him for the labor and services of others, amounting in the whole to \$415.12, should be allowed to him on the settlement of his accounts. 1. The proceedings, accounts, settlements and compensation of guardians are governed by the same rules as those of executors and administrators. (3 *R. S.* 246, § 22, 5th ed. *Dayton's Sur.* 635, 639, 2d ed.) 2. The surrogate has power not only to appoint these officers, but also "to direct and control their conduct." (3 *R. S.* 362, § 1, subs. 3, 7.) They are appointed by the surrogate, and he being authorized "to direct and control their conduct," they with great propriety look and apply to him for direction and advice, and within certain limits, that direction and advice, if followed, affords them protection. The surrogates' courts throughout the state recognize and approve of this practice, and it fully accords with the spirit and intent of the statute and decisions. Of course the surrogate must exercise his authority in the cases, and in the manner prescribed by statute. 3. Certain facts which appear from the testimony and the opinion of the surrogate, are worthy of notice. The guardian managed the estate with prudence, economy and good judgment; he filed his annual accounts after they were examined and corrected by the surrogate; they contained no gross errors or mistakes; there was no attempt at concealment, no keeping back accounts or vouchers or explanations, but the whole business was conducted by the guardian with fairness, frankness and entire good faith. 4. The material facts are all admitted; the services were rendered, the charges were reasonable, and the small items of expenses were paid out and included in the amounts for each year, and scarcely the faintest attempt was made on the hearing to controvert these facts. This is also

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manifest from the opinion of the surrogate. He says "the evidence showed that the services were rendered;" but he disallows the charges on account of their supposed illegality. The matter therefore, very fortunately, is stripped of all difficulties of fact, and is reduced to the simple inquiry whether for such services rendered and expenses incurred in good faith the law denies all compensation. That such is not reason and substantial justice none will deny; that such is not the law can be demonstrated beyond a doubt. 5. The statute provides for the appointment of executors, administrators and guardians, defines their duties, and fixes their compensation. It provides that they shall receive for their services, besides their expenses, certain commissions on their receipts and disbursements. (3 R. S. 179, § 64. *Id.* 246, § 22.) A compensation is given for all the official and personal services of the officer, and the amount of it is ascertained by using as a basis of calculation that item of service which from its nature embraces or has direct reference to all or nearly all the other duties imposed upon him; namely, the receipt and payment of money. (*McWhorter v. Benson, Hopk.* 45, 46.) Now what are the duties of these officers? To receive and disburse money; to settle accounts in favor of and against the estates they have in charge; to rent and sell real and personal property in certain cases; to protect, preserve and manage to the best advantage the property and funds committed to them; to distribute and pay and deliver over these funds and property to those thereunto entitled, and to render an account of all their proceedings to the proper tribunals. As a general rule, and in the great variety of cases, these and such as these are the only duties imposed, and the only services rendered. (*See the various provisions of the Revised Statutes, relative to executors, administrators and guardians; McWhorter v. Benson, Hopk.* 45.) And it is for these services, prescribed by statute and rendered by the officer in his official capacity, that the same statute has fixed the commissions as a compensation; and it

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is for these services that the decisions say nothing more can be allowed or received. Applying this principle to the case now before the court, the rule is in the very words of the law. "For the services of the guardian *as such*, the compensation is limited to the commissions allowed by law." (*Clowes v. Van Antwerp*, 4 Barb. 418. *Dayton's Sur.* 639.) "His commissions are in full for all his services *in discharge of his trust*." (*Vanderheyden v. Vanderheyden*, 2 Paige, 287.) By the act of 1817, the court of chancery, in settling the accounts of guardians, executors and administrators, was authorized to make to them a reasonable allowance for their *services as such* guardians, executors and administrators. (*McWhorter v. Benson*, *Hopk.* 36.) These passages indicate distinctly that there is a class of services pertaining to guardians *in all cases*, and for these the commissions pay; and it also indicates that there *may* be services rendered by the person who is guardian, which are not included in this class, and for which the commissions are not given as a compensation. 6. The idea is an utter fallacy, that the commissions are a compensation for every service of every kind, which he who is a guardian may render for his ward or about his ward's property. Becoming a guardian does not destroy the individuality of the person; because he is a guardian he does not thereby cease from being any thing else; he does not lose his identity as a physician, a lawyer, a teacher, a farmer or mechanic. Notice some instances: If the guardian is a physician and renders professional services to his ward, does he do this as guardian, and do his commissions compensate him for these services? If he is a lawyer and renders professional services for his ward, or respecting her estate, does he do this in his capacity as guardian, and do his commissions make his compensation? This question has been before the courts, and they have decided that the guardian who is an attorney, and does legal business for his ward or respecting his estate, is entitled to his costs. (*In the matter of the Bank of Niagara*, 6 Paige, 216. *Dayton's Sur.* 496.)

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If the guardian is a teacher and instructs his ward and furnishes his complete education, is all this labor and expense met by his commissions? If the guardian takes his ward into his own family and boards and provides for him during his entire minority, is all this to be done without any compensation except his commissions? If the guardian is a shoemaker, or a tailor, and makes the shoes or clothes of his ward, does he do this as guardian and receive his pay by his commissions? Suppose the guardian is a manufacturer of pianos and with his own hands makes one for his ward, is all this service included in his duties as guardian? And must he still look to his commissions for payment? Suppose he is a farmer and cultivates the land of his ward; or a mechanic, (a mason or a carpenter,) and makes proper and necessary repairs upon the buildings of his ward; or a day laborer, and in fact and good faith bestows useful labor upon his ward's property, secures his crops or carries them to market, does he do all as guardian, and is his remuneration to be limited to his commissions? And in order to save himself from loss, must he be careful always to employ a stranger to render the services which I have mentioned and others of like kind, which are constantly occurring? In other words, is the man altogether merged in the guardian so that all his acts and deeds which relate to, or affect his ward, are counted as the acts and deeds of the guardian? as his official duties in the discharge of the trust? 7. Such is not the law; the statutes of this state are not an iron rule, which bring all cases to a *verbal* standard irrespective of circumstances, and blind to justice and reason. There is no case which lays down any such rule as that contended for by the respondents; not a single case is reported where services such as I have mentioned have been regarded as within the official duties of the officer and therefore paid for by his commissions. Indeed, no case can be found in which the question has arisen in its present form, and it has been reserved for the boldness or the ingenuity of the contestants in the present instance to set up

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an objection almost unknown in surrogates' courts in this state, and never tolerated to the prejudice of substantial justice. Whether correctly or not, the uniform and established practice in the surrogates' courts throughout this state is this: That for services of the kind rendered in this case, fairly rendered and satisfactorily proved, a reasonable compensation is to be made without reference to the commissions. In the reported cases in which some allowance above the commissions has been asked for and denied, it will be found that the services were strictly within the *official duties* of the executor or guardian. *Dayton*, (*Sur. p. 496*,) says: "He will not be allowed any other or further recompense, however great may have been his trouble or loss of time, *in conducting the administration*;" speaking thus of *services strictly official*, and not of services such as I have mentioned above, and such as were rendered in the present instance. Several cases are reported in which executors have asked for special compensation in transacting the business of the trust, as agents, clerks, book keepers, and the like; and in these cases the applications were denied, and rightly so; for the services rendered, though perhaps very burdensome, were such services as belonged strictly to the duties of the officer. (*Clinch v. Eckford*, 8 *Paige*, 412. *In Re Livingston*, 9 *id.* 440. *In Re Fisher*, 1 *Brad.* 335. *Dayton's Sur.* 497.)

8. But at this stage of the argument, one thing should be noted, to wit: That services rendered by executors, guardians, and the like, for which special compensation is claimed, should always be closely scrutinized. There is opportunity and danger of abuse, and whenever any thing of that nature is discovered the court will visit it with a heavy hand. In all cases, therefore, it is better for the officer to omit such services as far as practicable; but if necessity, or clear and decided economy, require their rendition, then it is advisable to obtain the direction of the surrogate in advance, and that direction followed fairly and in good faith affords full protection. Clearly it is within the province of the surrogate to

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give such directions, under the power "to direct and control the conduct" of guardians. (3 R. S. 362, § 1, sub. 7. *Bliss v. Sheldon*, 7 Barb. 152. *Same case*, 4 Seld. 34. *Willard on Executors*, 254.) The experience of every surrogate will suggest cases, in which he has given such directions, and certainly with the idea that he acted within the sphere of his duty in so doing. And the direction being given and followed by the guardian, is it not a sufficient protection? In the present instance, the guardian took this prudent course, and consulted with and obtained the direction of the surrogate in advance; and not only for the first year, but for every year, and for the years when \$50 was allowed as well as for the others. In addition to this, his accounts in detail were submitted every year to the surrogate; they were closely examined, the guardian was sworn and testified as to the particulars, and after all this, the amounts were fixed, and the accounts passed by the surrogate. 9. And not to rely too much upon general principles, or general statements respecting the rule and practice in such cases, reference is made to the opinion of Mr. Bradford, the learned and accomplished late surrogate of the city and county of New York, upon a written statement submitted to him of the facts in this case. His long experience in office renders his opinion upon all questions of surrogate's practice worthy of great respect and confidence. He says: "The case is very clear. The commissions are only an allowance for the receipt and payment of moneys. For his *personal* services as guardian, there is no compensation; but for work done not as guardian, *under the permission of the surrogate*, there is no possible reason why he should not have the usual compensation." Can there be any doubt that these items should be allowed? The guardian must suffer great and manifest injustice if they are stricken out; while the justice and fairness of the account, (being for services actually rendered, and expenses in fact incurred,) the reason of the whole thing, the law of the land, the uniform practice

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of the surrogate's court, and the actual direction and approval of the surrogate, at the time these services were rendered, and charges made, all indicate that they should be allowed.

II. A guardian is entitled to interest on advances made by him necessarily and in good faith, in the business of his ward, and this was the character of the advances made in the present instance, beyond a question. (2 *Williams on Executors* 1318, and note. *Dayton's Sur.* 500, 639. *Jennison v. Hassgood*, 10 *Pick.* 77.) If the rejected items for services are allowed, then a proper interest account should be made up from the date at which each item should have been allowed. (2 *Williams on Executors*, 1319.) If the surrogate was correct in striking out these items, then the annual balances are too small to render an interest account important.

III. A reasonable allowance should be made to the plaintiff from the estate, for his expenses, witnesses' fees and counsel. This should be done in view of the whole case, and whether the rejected items for services are or are not allowed. Observe the guardian's position from first to last; his fidelity in keeping and rendering his annual accounts; his readiness to bring on and complete a final settlement; the very trifling charges made in the account by the surrogate aside from the items for services, and the very considerable expense and trouble to which he has been subjected in attending so often before the surrogate. Even if the items for services were rightfully rejected, the reduction of the balance claimed by him, produced by striking out those items, does not furnish any reason for refusing him costs. In making those charges, he acted by the direction of the surrogate, and the items themselves were audited and allowed in his accounts by the surrogate. He surely should not be punished for the errors of the officer to whom he had a right to look for direction respecting his rights and duties.

M. H. Throop, for the respondent. I. The only question of any importance which arises upon this appeal, is whether

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the surrogate was right in rejecting the items for "services and expenses of the guardian," amounting in all to \$415.12. If they are rejected, there are in fact no "advances" upon which it would be possible to allow any interest, as the yearly receipts show that half of the time the guardian had a balance in his hands belonging to the ward, equal to the balance on the side for the other half of the time. If, on the other hand, the extra charge for services were allowed, still there can be no interest charged to the ward, as the alleged "advances" would consist of the guardian's charges and commissions, and there is no rule of law which allows interest to a guardian in such a case. The question of costs was discretionary with the surrogate. (2 R. S. 223, § 10. 3 *id.* 5th ed. 367, § 25.) If the decision upon this point could be reviewed on appeal, this appellant would have no ground of complaint, as it was more favorable to him than he had a right to expect.

II. The surrogate was right in rejecting the appellant's charges, over and above his commissions, for "sundry services and expenses." 1. A guardian can have no allowances, except his commissions, for any services of whatever nature, or however meritorious they may have been. The rule is inflexible, and applies to all trustees whose compensation is regulated by statute. The statutory allowance is all that they can get from the trust fund, directly or indirectly, upon any pretext whatever. "Guardians shall be allowed for their reasonable expenses, and the same rate of compensation for their services as is provided by law for executors." (2 R. S. 153, § 22; 3 *id.* 5th ed. p. 246, § 22.) "On the settlement of the accounts of an executor or administrator, the surrogate shall allow to him for his services, . . . over and above his expenses. 1. For receiving and paying out," &c., &c. (2 R. S. 93, § 58; 3 *id.* 5th ed. 179, § 64.) The language of the statute is as broad as it could be made, and the decisions so far from restricting it so as to include only services rendered in the character of trustee, have given it its full

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scope and meaning, and laid down the rule as broadly as I have stated it. The same rules which govern the settlement of executor's accounts, apply to the settlement of those of guardians, particularly as to compensation. (*Dayt. Sur. 1st ed. 639; id. 2d ed. 691, 695.*) This writer lays down the foregoing rule in the broadest terms, excepting only the case of a trustee who acts as attorney or solicitor for the estate, who, it is said, with a *semble* upon the authority of the case in 6th Paige, 213, can be allowed his *taxable costs* in this state, though the rule is otherwise in England. (*Dayt. 1st ed. 496, 497; id. 2d ed. 538, 539.*) If he drives his own horse and carriage, it is doubtful whether he can be allowed for their use. If so, he can't charge the price which he would have paid for the hire of a conveyance, for that would include a profit, and the policy of the law is against allowing him any thing. (*Id. 1st ed. 498; 2d ed 540; see also Tiffany & Bullard on Trusts, pp. 838, 842, 849, 854, 858.*) The rule is also laid down in equally strong terms in the following cases: *McWhorter v. Benson*, (*Hopk. 28.*) *Vanderheyden v. Vanderheyden*, (*2 Paige, 287.*) *Fisher v. Fisher*, (*1 Bradf. 336.*) *Clinch v. Eckford*, (*8 Paige, 412,*) and nearly fifty cases cited in the note to the 2d ed. of *Paige*. In the matter of *Livingston*, (*9 Paige, 440; 2 Denio, 575.*) *Clowes v. Van Antwerp*, (*4 Barb. 416, 418.*)

In Re Bank of Niagara, (*6 Paige, 213.*) This case is full to the point to sustain which I cite it, and it is not even authority that taxable or taxed costs are to be paid to the trustee out of the fund, for, as I read the case, the costs which were allowed to the receiver had been collected out of the other side and credited to the fund. But if I am wrong in this reading, the principle is not shaken, for the costs were fixed by statute, and may therefore be deemed a *statutory* allowance for those particular services. (a) It is very true that the primary object in view in passing the statute was to remove the inability of the courts to allow trustees compensation for their services, in the discharge of their

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ordinary duties, but the statute is so worded and the courts have so construed it that nothing beyond the statutory allowances can be awarded to the *individual* for any services whatever. Indeed, if the statute was taken away entirely, the services charged for in this case could not be allowed, for the rule is of universal application, in the absence of any statutory qualification of it, that the trustee shall not directly or indirectly derive any benefit whatever from his trust, and compensation for these services should be denied, upon the same principle that a trustee is not allowed to purchase the trust estate for his own benefit, no matter how fairly he may have acted. (*Dayton, ubi supra. In Re Bank Niagara, 6 Paige, 215.*) (b.) Of the case before the court in 6th Paige, it may be said that no species of personal services can be subjected so directly to the supervision of the court, and afford less opportunity for abuse, than those of a counsel. Of this case it may be said that it is impossible to suggest a state of facts when there is greater probability of abuse and fraud, than when the trustee claims to be remunerated by a per diem compensation for services, of the necessity and extent of which he is the only judge. (*McWhorter v. Son, Hopk. 41, 42.*) (c.) This case is absolutely in accord with warnings against the danger of departing from the path which previous decisions have marked out. It appears that this guardian was for many years the tenant of one of the houses of the ward. In the double capacity of landlord and tenant, he was to fix the amount of the rent which he was to pay, and the case shows that he was so far subject to human frailty, that the present surrogate was compelled to increase the amount with which the guardian had charged himself for rent in the accounts which had been "allowed" by the late surrogate. This is a striking instance of the wisdom of the rule which forbids a man from acting in a double capacity—a rule of universal application in the law. (*Per Denio, C. J., 4 Kern. 91, 92.*)

II. The testimony as to the "expenses" included in the

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charges which were disallowed, is at least very vague, but it appears clearly that they were but trifling in amount, compared with the sums charged for services. And it is impossible for the court to make any allowance for them, because it is impossible to separate them from the illegal charges for services, the whole having been charged in gross, and the guardian being unable to specify either the items or the sum total of the expenses.

III. The "directions" and "allowances" by the late surrogate, and the various bargains between him and the guardian were without authority, and cannot affect the result either way. As to the settlement of the claim in 1856, and the arrangement for a fixed compensation in subsequent years, there is no pretense of these acts being those of the surrogate, and we presume that even the learned counsel for the appellant will not pretend that a surrogate can pronounce any deputy an oral judgment, which shall bind an infant who is not represented. But the so called "allowances" in 1853, 1854 and 1855, were equally unauthorized. 1. The surrogate's court is a creature of the statute, and has no power of jurisdiction except such as the statute has bestowed upon him expressly or by implication. The statute has conferred upon it no power to settle a guardian's account *ex parte*. To bind the ward by *ex parte* orders and proceedings in relation thereto. On the contrary, the whole scope and design of the statute, is that the accounts shall remain unsettled until a final settlement, which can only take place upon the guardian being appointed, or the ward coming of age. On the happening of either of these events, the interest of the ward will be properly represented and protected; until then there is but one party to the proceedings, and they are therefore *ex parte*. The "allowances" spoken of by the late surrogate, were wholly *coram non judice*; his duty upon receiving the annual accounts being simply to file them. There is no provision in the statute for settling or allowing them; the surrogate is not required to take any action unless

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they are insufficient upon their face, in which case he is to take proceedings to procure "a more full and satisfactory account;" or unless they show waste, improvidence or misconduct, in which case he is to take proceedings to procure the guardian's removal. (3 *R. S.* 5th ed. 244, §§ 11, 12; 245, § 20; 246, § 28; 247, §§ 34, 35; 248, §§ 36, 37. *Dayt. Sur.* 2d ed. 696, 697. *Seaman v. Duryea*, 10 *Barb.* 523; 1 *Kern.* 324; *Farnsworth v. Oliphant*, 19 *Barb.* 30.)

2. The proceedings upon which the appellant relies, were taken without any notice to the minor, and without the appointment of any guardian to protect her rights. There is no court so high that its adjudications would not be void in such a case. 3. In order to render the decision of any tribunal of any binding effect, it should be made and entered in writing. The plain letter of the statute of 1837, (3 *R. S.* 5th ed. 248, §§ 36, 37,) shows that until the decision appealed from was pronounced, there was no *settlement of accounts* which bound the ward. If the allowance for personal services is attempted to be sustained on the idea that the work was done under the direction of the court to a trustee, over whom it had jurisdiction, it would be sufficient to say that the loose talk of a judge, in his office or elsewhere, is not such a direction as can create or take away rights, even if the conclusive objection did not exist, that the direction itself is not only unwarranted by all the rules of law, but is in the teeth of the statute limiting the compensation of guardians, as the same has been expounded by all the courts.

BACON, J. The only controversy between these parties as presented on this appeal, respects the disallowance by the surrogate of items in the guardian's accounts, amounting in the aggregate to some \$400, consisting of charges running through six years, for his personal services and expenses in attending to and keeping in repair the property of which he had charge on behalf of his wards. If the surrogate had placed his decision upon the ground either that the services

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had not been rendered, or that the charges were improper or extortionate, we should not probably have deemed it expedient to review, or reverse his final judgment. But in the opinion given by him in disposing of the case, it is expressly conceded that the services were rendered; but "the charges," he says, "are all disallowed on the ground that the commissions of the guardian cover every thing which can be allowed to him for his services respecting the estate of his ward."

This is placing the decision upon very simple and intelligible ground, and if the rule is as thus announced, and this case cannot for any other reason be excepted from its operation, then the judgment of the surrogate is right, and must be affirmed. Is it then, in the first place, the inflexible rule, that the commissions of the guardian cover "every thing" which can be allowed to him for his services "respecting the estate of his ward?" It will be conceded that the accounts, settlements and compensation of guardians are governed by the same rules that are either prescribed by law, or by the construction of the courts have been made applicable to those of executors and administrators. In the case of executors and administrators, the statute provides that they shall receive "*for their services*," besides their expenses, certain fixed rates of compensation by way of commissions upon their receipts and disbursements. Now for what "services" is this compensation provided? Are they not, briefly and generally expressed, those which have respect to the proper management of the funds committed to their charge, to the duty of leasing and selling under certain circumstances, the real and personal estate, and to keeping and rendering just and accurate accounts?

For services of this character, the statute has assumed that a certain rate of commission upon funds received and disbursed would afford a reasonable compensation, and has therefore fixed the rate accordingly. The rule is expressed in *Vanderheyden v. Vanderheyden*, (2 Paige, 288,) as follows: "The executor must be confined to the allowance of a fixed rate by

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way of commission &c. in full for his services *in discharge of the trust.*" And in respect to guardians, in *Clows v. Van Antwerp*, (4 Barb. 418,) the court use substantially the same language, when they say that "for the services of the guardian *as such* the compensation is limited to the commissions allowed by law."

There are cases to be found in our reports where language has been used, and sometimes the application of a rule has been made, indicating that this rate of compensation covered the entire field of service and duty of the guardian, and would apparently deny him remuneration for personal services outside of his specific trust, and for moneys actually disbursed by him for the benefit of the estate. We have been referred to several such cases. They indicate a jealous scrutiny, such as should always be exercised by the courts, in respect to accounts against infants, and the estates of deceased parties, which experience shows are peculiarly liable to spoliation. In *McWhorter v. Benson*, (Hopk. 28,) it was held that the act of 1817 authorized the court to make an allowance to executors, for their services, at a fixed rate, but did not authorize any special allowances without regard to such rate. It did not appear in that case that the executor had performed any services outside of his peculiar duties in taking charge of the estate, but it did appear that he had employed an agent to manage the affairs of the estate, which were extended and complicated, and for this agent a specific compensation was allowed, and thus practically, although not directly, the rule was dispensed with in that case.

In *Clinch v. Eckford*, (8 Paige, 412,) it was held that the executors were not authorized to employ one of their number to perform extra services as clerk, in keeping the accounts of the estate, and to allow him a salary in addition to the commissions allowed by law. The keeping of the accounts is one of the specific and most appropriate duties of an executor in the discharge of his trust. In *Vanderheyden v. Vanderheyden*, (2 Paige, 287,) it was however decided that an executor

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or guardian might employ a clerk or agent, and charge the expense to the estate, where from the peculiar situation or nature of the property, the services of such clerk or agent would be beneficial to the estate, although for his own services the statutory commissions only could be allowed. In the *Matter of Livingston*, (9 Paige, 440,) the same rule was held; the chancellor deciding that the committee of a lunatic could not receive an extra compensation for his services as clerk on behalf of the estate, but that such compensation was embraced in the allowance of commissions under the statute.

Such is the general scope and tenor of the cases. And from them I think the rule is fairly deducible, that where extra compensation has been applied for and denied, the services for which such remuneration was asked, were strictly, and it might perhaps be said peculiarly, within the official duties of the executor, guardian or trustee, and that no other recompense can be allowed than such as the statute provides for conducting the administration of the estate in all that legitimately pertains to it.

But I do not understand that this rule is so narrow and restricted that it denies all compensation to a guardian for services of a personal or professional character, rendered by him for the benefit of the ward, and in doing which he has bestowed personal labor, and incurred actual expenses, and which have been useful and serviceable to the estate. Several examples of this are indicated in the brief of the appellants' counsel; and it is pertinently said that by becoming a guardian the individuality of the person is not lost, nor is he any the less a physician, lawyer, farmer or mechanic, as the case may be. If in any such character he bestows services reasonable in amount and valuable in their nature, why should he be deprived of all compensation for them because in another character he has performed other services for which the law has made specific provision? In the case of an attorney who had performed professional services for his ward, the court of chancery has decided that he was entitled to the costs

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of suits prosecuted by him on behalf of the estate. (*In the matter of the Bank of Niagara*, 6 Paige, 213.) This decision, in my judgment, covers the whole ground, indicates the true rule to be applied to this case, and establishes the claim of the appellant to the compensation for services and expenses charged by him, it being conceded that those services were fairly and honestly rendered. If an attorney may charge for and collect his costs, which are in a large degree for his personal services, I am unable to see why a mechanic, for services in his line, rendered for his ward, is not entitled to the same measure of simple remuneration. It is no answer to say that the fees of the attorney are fixed by law, and are thus to be deemed a sort of statutory allowance; for although the items are fixed, they are no less intended to be and are in fact a compensation for purely personal services, and thus afford to the guardian or trustee a personal profit.

If this is the correct conclusion, it is decisive of this case, and leads necessarily to a reversal of the decree of the surrogate. But there is another aspect, still, in regard to which it may be doubted whether the surrogate did not err in rejecting these disputed items.

During the time these services were rendered, the guardian, upon reference to and consultation with the surrogate then in office, received from him instructions in regard to the manner in which the work should be done, how the account should be kept, and the amount of his compensation, and from year to year and every year covered by these charges, the account was rendered to the surrogate, examined carefully, and the amount fixed and allowed by him.

One of the duties of the surrogate prescribed by the statute in respect to guardians, is, "to direct and control their conduct." (3 R. S. 362, § 1, sub. 7.) And this seems to me just one of the cases where the direction of the surrogate having been invoked, the whole matter having been under his advice and control, the service rendered and the charges made pursuant to such direction, and the account scrutinized

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and settled by him, it should have been conclusive upon his successor, and upon no just principle liable to be again opened and readjusted.

No hardship could in such a case occur to the wards; for their interests were in the keeping of the tribunal peculiarly set for their protection and defense, exercising therein precisely the office discharged by the surrogate now in office, and with equal and co-ordinate authority. Of such a case I should say, in the words of Surrogate Bradford, that although for services as guardian there is no other compensation than the commission fixed by law, yet "for work done not as guardian, under the permission of the surrogate, there is no possible reason why he should not have the usual compensation." It is not necessary, however, to put the case on this ground, as the other is conclusive.

The decree of the surrogate should be reversed, and the case sent back for a rehearing. The proper adjustment can undoubtedly be made upon the proof now before him, and he may perhaps deem it expedient to modify the order in regard to the costs of the proceeding, by charging them upon the estate.

MULLIN, J. concurred.

MORGAN, J. (dissenting.) It is a principle of general application that one having a trust to perform cannot bind the *cestui que trust* by a contract in his own behalf. The temptation which such an authority would hold out to the trustee to make a profit of the transaction, is a sufficient reason for adhering to the principle in all cases which come within its application. (*See Van Epps v. Van Epps*, 9 Paige, 241.) It is admitted that the guardian in this case had no right *as guardian* to perform the services and charge them to his ward. But I have failed to appreciate the distinction between his doing the services *as guardian* or as a mechanic. It is said that it is no part of the duty of the guardian to

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drive nails and repair houses and fences. But I am inclined to think that it was the duty of the guardian either to do it himself or to procure somebody else to do it. He was under no obligation to spend his time in doing the labor himself, but had an undoubted right to procure some one else to do it, and charge the expense to his ward. If he did it himself, he cannot make a profit out of it, for it is contrary to the whole tenor of the decisions to allow the guardian to make a profit in his dealings with his ward. The profit belongs to his ward, and not to the guardian. It may be asked, what are the profits in this case. It is difficult to determine, and this very difficulty shows the importance of adhering to the rule, which as I understand it, refuses to allow any thing to the guardian except his commissions for personal services. Plausible reasons are given for allowing the guardian, who is a doctor, to charge the ward for services which he has rendered to his ward as a physician; and also to allow the guardian a certain sum for board when it appears proper that the ward should board in the family of the guardian. It is easy to see that in exceptional cases, such allowances would at least be no more than would be paid for the same services to others; and the guardian might be willing in some cases to board the ward cheaper than he could procure it elsewhere. Of course the statute allowances would cover the actual expenses of medicine and board in the cases supposed, and all beyond that are profits. It would doubtless prove a difficult task to determine what was the actual expense of board, when the account came before the surrogate; but it is better that the guardian should be put to this difficulty, than to allow him to make a profit out of it. I think the statute intended to make full provision for the personal services of the guardian, whether he is a physician or a mechanic, and that it is a dangerous departure from the rule applicable to guardians and wards to sanction the doctrine which is so ably defended by the appellant's counsel in this case. The chancellor in one case allowed an attorney, who was guardian, to charge his

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ward the taxable bill of costs when the interests of his ward had been in litigation. It may be said of that case, that the statute and not the guardian, fixed the amount of the compensation. Still the precedent is now urged to give color to charges in all cases where the guardian has performed services instead of procuring others to perform them. I think that case stands quite alone as an authority in this state, and if it establishes a new principle, should not be extended to other cases not coming within its application. It is an anomaly in legal language for a guardian to hire himself to do carpenter's work for his ward, and such a contract is clearly a violation of the principle which prohibits a trustee to act for himself while he has a duty to perform towards his ward, inconsistent with his own interest as an individual. It might not lead to abuse if the guardian, as in this case, first obtained the consent of the surrogate to charge for such services, but it is for the legislature and not the courts to adopt such a rule, if it is found necessary and convenient. There is no reason to doubt the good faith of the former surrogate in his dealings with the guardian here; and it is not from any belief that injustice was done the infant by the former surrogate, that I feel constrained to sustain the decision of the present surrogate in disallowing the items of account which the former surrogate thought proper to sanction; but I am unwilling to impair a rule so necessary to the safety of infants, and adopt a new one, which will hold out a strong temptation to guardians to eat up the estate of infants by similar charges. The decision or opinion of the former surrogate in allowing for these services, while the ward was under age, was without authority. (*Diaper v. Anderson*, 37 Barb. 168.) I think the decree should be affirmed.

Decree reversed.

[ONEIDA GENERAL TERM, January 6, 1863. *Mullin, Morgan and Bacon*, Justices.]

JOHN N. RICHARDS, executor, &c. vs. GEORGE O. WARRING
and others.

Where, after two persons had signed a promissory note, not negotiable, a third person wrote his name across the back, and it was thereupon transferred to the payee, who parted with the full consideration mentioned in it upon the credit of the note, the note having been in fact made to obtain such consideration; *Held* that the person so writing his name upon the back of the note was not an indorser, nor a guarantor, but was a joint promisor with the other signers; and that the precise locality of his signature, upon the note, was immaterial.

The code of procedure has not abrogated the distinction that existed in the law merchant, between negotiable and non-negotiable paper.

THIS was an action brought by the plaintiff as executor of Platt Richards, deceased, upon a promissory note, of which the following is a copy:

"\$820. One year after date we promise to pay Platt Richards, eight hundred and twenty dollars, with interest, value received, Amsterdam, April 1st, 1857.

(Signed) JAMES E. WARRING.

JAMES B. CHAPMAN."

And written across the back, "George O. Warring."

This note was given for \$820, loaned by the plaintiff's testator, to James E. Warring and James B. Chapman, composing the firm of "Warring & Chapman." When delivered by them to the payee the note was executed, in the form it now appears, by all the persons whose names are upon it, and the money was paid by the payee to the firm of "Chapman and Warring," at the time the former received the note. The loan was made upon the credit of the note. Richards, the payee, died January 20th, 1860, and the plaintiff is his sole executor, duly authorized, by letters dated 5th April, 1860. The cause was tried before a referee.

"Chapman & Warring," the signers upon the face of the note, made no defense on the trial. The defendant "George O. Warring," set up in his defense that he was an *indorser* only, and insisted that he could be made liable in no other

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character. It was admitted that he had no part of the money, nor any benefit therefrom, and that no steps were taken to charge him as an indorser. The due execution of the note by all the parties defendant was admitted. The defendant George O. Warring, on the trial, called as a witness his co-defendant, James E. Warring, who testified "that before delivering this note, and obtaining the money thereon, he presented to George O. Warring a note, similar to this, payable on demand, and asked him to indorse it, which he refused to do, but said he would indorse it if made payable one year after date. "I then made this note and he indorsed it as it is."

The referee reported in favor of the plaintiff, and from the judgment entered on the report the defendant George O. Warring appealed. •

J. Pulver Heath, for the appellant.

J. M. Carroll, for the plaintiff.

By the Court, POTTER, J. If the code of procedure has not abrogated or interfered with what is commonly known as the commercial law, or law merchant, as it has been understood in this country, the question to be decided is, strictly and only, a question of law. Assuming, for the present, that the "law merchant" remains unchanged; what then is the *legal effect* to one who writes his name, without any thing more, upon the back of a promissory note *not negotiable*, which is thereupon transferred to the payee named in the note, and who at the time of the delivery thereof to him parts with the full consideration mentioned in it, upon the credit of the note? That, I think, is this case fairly stated. It seems to me the law itself in such case determines the character and effect of the contract as between the parties, and that we may therefore start with the legal presumption that each of the parties equally well understood what liability

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the law has so fixed to the several signatures, and that each, in so making the contract, was content to leave and did leave the contract to be interpreted and the effect declared by the law of the land. Lord Bacon, in his Maxim, Regula 3, that "words are to be taken most strongly against him who uses them," says: "It is a rule drawn out of the depth of reason; for, first, it is a schoolmaster of wisdom and diligence in making men watchful in their own business; next, it is the author of much quiet and certainty, and that of two sorts, first, because it favoreth acts and conveyances executed, taking them still beneficially for the grantees and possessors, and secondly, because it makes an end of many questions and doubts about construction of words; for if the labor were only to pick out the *intention* of the parties, every judge would have a several sense; whereas this rule doth give them a sway to take the law more certainly one way." (*Id. Max. 18, in Reg. 3.*) "Words ought to be understood so as to have some operation." (*Fox's case, 8 Co. 94.*) In attempting to interpret this instrument from its *words*, I shall therefore hold, as is insisted on the argument by both parties, that this contract must speak for itself by its own language, and that the intent of the parties to the note cannot be changed or established by parol.

Each signer of the note, then, is presumed to have known that the object of having his name appear upon it, was to give strength and responsibility to the paper for the purpose of obtaining the desired credit. This presumption is confirmed by the circumstances attending its inception, for though parol evidence may not be admitted to alter or contradict a written instrument, evidence of extrinsic circumstances may be given in *aid* of a construction consistent with, or in support of the terms of the contract. So evidence of the consideration of a note between the parties to it, and of the purpose for which it was made. (3 *Kern. 559. 1 Barb. S. C. Rep. 635. 3 id. 79. 18 N. Y. Rep. 367.*)

It is admitted that upon the credit of the paper so exe-

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cuted and delivered to the payee, the money was actually advanced. While there has been a long and somewhat doubtful conflict going on in the courts in regard to the liability of indorsers in blank, in certain cases upon *negotiable* paper, there has been little or none that I am aware of in regard to the effect of signatures to paper *not negotiable*. The distinction between these two kinds of paper has not, I think, been confounded, and it seems to be principally for the reason that by the law merchant the term "*indorsement*" is not a proper legal term to apply to the act of one who adds his name in any manner to the latter kind of note.

The proper definition of "*indorsement*" or "*endorsement*," in the commercial sense, is "the writing of one's name upon or across the back of a bill of exchange, promissory note or check, by which the property is assigned or transferred." Literally, "to write on the back," but in practice the plan of writing is not essential, it is a good indorsement if made upon the face, (*Story on Notes*, § 121,) or even on a separate piece of paper. (*Chitty on Bills*, 141.) This effect, that is, a transfer, is not wrought upon a note *not negotiable*, by a signature across the back of it. The title, or property, does not pass by merely writing the name thus upon it. It is not, therefore, properly and legally an "*indorsement*," when applied to the latter kind of paper. The note is not thereby transferred. (*Per Bockee, senator, in Hall v. Newcomb*, 7 Hill, 422. *Burrill's Law Dic.* title "*Indorser*."

Not being such an indorser as to pass the title, it is clear, that strictly by the law merchant, the defendant is not liable as such. But did not the defendant, therefore, make any contract with the payee by so affixing his name to the note? Though it is not negotiable, the instrument is still by the law merchant a promissory note, which is defined to be "a written engagement by one person to pay another person therein named absolutely and unconditionally a certain sum of money at a time specified therein." *Story on Promissory Notes*, § 1, defines, and our statute declares, (1 R. S. 768,)

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that "all notes in writing and *signed by any person* whereby he shall promise to pay to any other person or his order, or to the order of any other person, or unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed, and shall have the same effect and be negotiable in like manner as inland bills of exchange *according to the custom of merchants.*" The custom of merchants, as to the effect of the contract and of its negotiability, is here expressly recognized by statute. Did the defendant then, in presumption of law, intend to bind himself in some manner by so adding his name? I think he did, and it only remains to say in what character the law declares that intent to have been made. It is insisted and with great force that he *intended* only to bind himself as indorser, and not otherwise, and that the court cannot make another contract for him. It is clear that he put his name on the note knowing that the money was to be obtained on the note from Richards. It is equally clear that he knew his name was wanted to give credit to the note to Richards. He could not have believed that he was becoming only the security for Richards, and not security to him. What was the use of security to Richards? He was lending money on the strength of the paper. How would Richards be benefited or the defendant liable if he, Richards, was to be first liable? Reason excludes the idea that he only intended to indorse and become liable after Richards, the lender. Neither of the parties intended to make such a contract. He must therefore have known that by signing his name upon the back of a note not negotiable he was *not* becoming an indorser. The legal presumption as to his *intent* is that he did not intend to sign it as indorser. I concede the law to be, as urged, that the court are not authorized to spell out or write out another contract for him that he did not himself make. But still the fact remains that he put his name to the note. The law then steps in and declares that he put it there for some purpose. It is fair then to presume that he *intended* it to stand there in some

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legal form of security to the payee in the note for the money that he (the payee) was to advance upon it. The maker as well as the indorser of a note always warrants the legality of the contract. (*Bayley on Bills, Sewell & Philips' 2d ed.* 149. *Burrill v. Smith*, 7 *Pick.* 294. *Edw. on Bills*, 289. *McKnight v. Wheeler*, 6 *Hill*, 493.) Now, as there seems to be no other parties in law to such a note, but *guarantor* and *maker*, he must have intended to become security, in one of these forms of "guarantor" or "maker."

If the legal presumptions are as we have said, then he must of necessity have signed the note to the payee, in one of these relations. This relation, I am equally clear, cannot be that of a "*guarantor*;" unless we revive the exploded doctrine that the party payee, or owner, is authorized to write a guaranty over the blank signature of the party attempted to be charged. Such a doctrine is not now in favor with the courts; it is denied by counsel here in this case to be the law. It could not be often available to a party unless it be carried to such an extent as to repeal the statute of frauds by judicial construction, or more properly by judicial legislation.

If it shall be held that the party possesses the power to write a guaranty over a signature, he should be held also to have the right to express the consideration therein; otherwise the statute would defeat his contract, when it is so written; or he must be permitted to prove a consideration by parol evidence, thus carrying the power of making the new agreement to such an extent as to mean something else than what upon its face it purports to mean. This is a doctrine fraught with such dangers and difficulties, is attended with such confusion in practice, such uncertainty in its limit, and opens a door to mischief so wide, that the modern cases have substantially overruled the whole of it. (*Brewster v. Silence*, 4 *Seld.* 207, 214. *Hall v. Newcomb*, 7 *Hill*, 416. *Brown v. Curtis*, 2 *Comst.* 225.)

It seems to me, therefore, that the defendant George O. Warring is not liable as "*guarantor*;" that this is not the

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legal character he assumes by thus putting his name upon the paper. If he was so, the pleadings could be amended, to conform them to the case proved. (2 *Seld.* 19.) Having then put his name to this note before its delivery to the payee, in order to become liable for the money advanced by him in such character as the law shall declare to be his liability, the remaining inquiry upon this branch of the case still is, what is the character of his liability? Is it not that of maker? If it is not, then most surely he is not liable at all. In *Hall v. Newcomb*, (3 *Hill*, 235,) Cowen, J. speaking of one who puts his name upon the back of a note not negotiable, says, "there is *no possibility* of raising the ordinary obligation of *indorser*," but in such cases (he says) "there is then room to *infer* that a *different* obligation was *intended*;" "the question depends entirely on the fact of negotiability." In *Seabury v. Hungerford*, (2 *Hill*, 84,) there is a dictum by the same judge, to the same effect; and he adds, "when the contract cannot be enforced in the particular mode contemplated by the parties, the *courts*, rather than suffer the agreement to fail altogether, will give it effect some other way."

Perhaps one of the strongest cases in the books against the defendant, is *Moies v. Bird*, (11 *Mass. R.* 436.) One Benjamin Bird was indebted to Moies, the plaintiff, for the part consideration of a farm, and gave him a note payable to his (plaintiff's) order, and the plaintiff and drawer of the note, (Benjamin Bird) then applied to two brothers of the latter, Wm. and Abm. Bird, to indorse the note. Wm. Bird refused, and Abm. said, "it was not a negotiable note, and he would write his name to make the plaintiff easy, but would not be accountable for a farthing on the note." The argument of Ch. J. Parker, in that case, accords with my views as here expressed. He said, "It is manifest that the defendant intended to make himself liable in some form; at least *such is the intent to be presumed* even against his declaration at the time of signing." "Had the note been made payable

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to him, and *negotiable* in its form, the plaintiff would have been restricted to such an engagement. In such case the defendant would have been held as *indorser*, and in no other form, for such must be presumed to have been the intent of the parties to the instrument. But this note was not payable to the defendant, *and therefore was not negotiable* by his indorsement." "What then was the effect of his signature? It was to make him absolutely liable to pay the contents of the note," &c. (*See also Sumner v. Gay*, 4 *Pick.* 311; 24 *id.* 64; 13 *Metc.* 205. *Griswold v. Slocum*, 10 *Barb.* 402. *Story on Prom. Notes*, § 473, and cases cited in note 1. *Dean v. Hall*, 17 *Wend.* 214. *Bryant v. Eastman*, 7 *Cush.* 113, *per Shaw, Ch. J.* *Edw. on Bills*, 230.) The case of *Palmer v. Grant*, (4 *Con. Rep.* 389,) was upon a note drawn in these words: "Six months from date, we, Grant & Wattles, as principals, and Daniel Carr and William Grant surety, promise to pay Cyrus Palmer or order, sixty-two dollars with interest, value rec'd.

(Signed)

GRANT & WATTLES."

On the back of the note, was written in the usual manner of indorsement:

"DANIEL CARR;

WILLIAM GRANT."

It was held that Daniel Carr and William Grant, though signing in the form of indorsers, and the contract expressing that they were surety, were liable, *not* as guarantors merely, but as joint promissors with Grant & Wattles. In this state, we have the case of *Griswold v. Slocum*, (10 *Barb.* 402,) and the case of *Lake v. McVean*, (*MS. opinion*), decided in this 4th district, at general term, *per Rosekrans, J.* to the same effect. "If one before the delivery of a promissory note not negotiable, subscribes his name to it without explanation, whether upon the face or back of the note, and the note be then delivered to one who upon the credit of the note advances his money upon it, he who so subscribes becomes liable to pay the note absolutely." (*Chitty on Bills*, 177.) In the case of *Gibson v. Minot*, (1 *H. Black.* 585,) Hotham,

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Baron, said, (speaking of the parties to a bill of exchange payable to a fictitious person,) "If they accepted a bill which they knew was so framed as to be incapable of being proved in the shape it bore; they shall nevertheless be held to their undertaking to pay it, though it be presented to them in another; because they themselves have induced such necessity, for it is a known rule of law, that no man shall take advantage of his own wrong." Perrin, Baron, in the same case, said, "Every person whose real name and signature appears on a bill of exchange, is responsible to the extent of the *credit* he gives to it in the negotiation of it." Our statute has adopted this principle. Notes payable to fictitious persons, are to be regarded as payable to bearer.

Such, as I understand it, is the law merchant; and such holding covers this case, and what is better, as seems to me, it is the good sense construction based upon a principle that the title is immediate, and that the contract appears from the terms of the instrument itself; that but two parties are named, the promissors and the promisee. The drawers chose to give the form they did to the instrument to secure a credit. The defendant George O. Warring accepted the form of the promise, and Richards parted with his money upon the credit of it. If the defendant is to be held to stand in any other character than that of drawer or joint promissor, it must be a character to be presumed against the express language of the contract he has signed. The rule is, that every expression in a contract is to be so construed, as to give it effect if possible. (*Chit. on Cont.* 70. 4 *Seld.* 446.) And "presumptions to *sustain* an instrument are to be favored—presumptions to *destroy* it, never."

I have no doubt these views of the law can be maintained as being the inherent principle, "*ipso jure*," of the contract between the parties; to which we may add, that *the law presumes the defendant promised in a legal form*. This is more sensible than a resort to any legal fiction, or to the principle, that such a holding can only be sustained in order to

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prevent an entire failure of justice, or to the maxim *ut res magis valeat quam pereat*," though this maxim is also adopted as applicable, in *Hall v. Newcomb*, (*supra*.)

This note is the very simplest form of a contract that can be devised ; the defendant George O. Warring puts his name to it as a contract, written in words, " We promise to pay," &c. ; his name is given as security for money to be loaned before the money is parted with ; the note is then delivered to the payee, and the money paid upon the strength of the contract. The law prescribes no place in particular upon the note, for the signature. It is good if written anywhere upon it with intent to be held liable. Though it is quite usual, that the makers sign notes at the bottom, they are good if signed elsewhere. (*Taylor v. Dobbins*, 1 *Strange*, 399, 18.) So it is usual to *indorse* notes by writing the name on the *back*, yet it has been held that an indorsement on the *face* was good. (*Edw. on Bills*, 267. *Saunderson v. Jackson*, 3 *Esp.* 180. *Venight v. Crockford*, 1 *id.* 190.) In this way no violence is done to sense : the law enforces what must be presumed to be the intent, the payment of the money to the person justly entitled.

There is another point strongly urged by the defendant's counsel which is new, and I feel bound therefore to give it a moment's consideration, viz: that the *only reason* for the distinction which has heretofore existed in the law between notes *negotiable* and those *not negotiable*, has been swept away by the provisions of the code, and does not now exist ; that the supposed reason was, that non-negotiable paper must always be sued in the name of the payee ; that by the code, the actual owner of paper may now sue in his own name ; (*Code*, § 111 ;) and, that the distinction having no ground of principle now to stand upon, ceases to be the law.

It is impossible, at this day, to say with certainty what were the reasons ; whether that assigned was one, or whether other reasons did not exist for the distinction, which is found in the law, between these two kinds of notes, negotiable and

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non-negotiable. The commercial law, which included the customs in regard to bills of exchange, was introduced into England in the times of Anglo Saxons, but had a disputed and a much earlier origin. (3 *Kent*, 10.) It was perfected from time to time as commerce increased, until it became a distinct code or body of rules, called "the law or custom of merchants," "*Lex mercatoria*," and was adopted almost universally by all the European countries, as the law relative to commerce. It was not peculiar alone to England, but became common to all nations in commercial intercourse with them, and especially in regard to the drawing, acceptance and transfer of inland bills of exchange. That part of this law which relates to bills of exchange was not introduced into common use in England until the close of the reign of Charles second. In *Bulles v. Crisp*, (reported in 6 *Mod.* 29,) Lord Holt said, "I remember when actions upon inland bills of exchange did first begin; and then they laid a particular custom between London and Bristol, and it was an action against an acceptor. The defendant's counsel would put them to prove the custom, at which Hale, chief justice, laughed, and said 'they had a hopeful case of it.'"

Lord Holt, down to that period, which was the second year of Queen Anne's reign, denied the negotiability of promissory notes, and in that case it was proved that promissory notes had been then in use about thirty years. But even in England, the distinction between bills of exchange and promissory notes existed, until it was found necessary to put them upon an equal footing by an act of parliament, 3 and 4 Ann, ch. 9. This act of parliament was substantially copied in the laws of this state, 27th of March, 1794, (*Green. ed. of N. Y. Statutes*, vol. 3, p. 140,) thereby adopting "the custom of merchants" as applicable to promissory notes.

This custom was also adopted as common law into most of the other states of the Union, with the great body of the English common law, substantially as it existed in England, and except in so far as the peculiarities of our condition have

demanded it, the legislature of this state and the courts have made no material changes in this body of law.

It requires no argument to prove that it ought to be as uniform as it is universal, and that every variation or *special* "lex loci" of this law of commerce, would inflict innumerable evils, and create serious embarrassments in all transactions affected by such change. I am not able to say from its uncertain origin, equally uncertain history, and more uncertain letter, that there may not be other *good reasons* than that named for the distinction referred to, and should not therefore feel justified without far greater research than I have been able to give it, to strike so radical a blow by construction at this feature of a law so common to all civilized commercial nations, as that now insisted on. By the law merchant, every transfer of a bill, whether by delivery when payable to bearer, by indorsement when payable to order, or otherwise, was called an *assignment*.

In *Gibson v. Minot*, (*supra*,) Lord Chief Baron Eyre said, "It is by force of the custom of merchants, that a bill of exchange is assignable at all. Of necessity, the custom must *direct how* it shall be assigned." In speaking of the usefulness of bills of exchange as perfected by the law merchant, he says: "The wit of man cannot devise any thing better calculated for circulation. The value of the writing, the assignable quality of it, and the particular mode of assigning it, are created, and determined in the original frame and constitution of the instrument itself, and the party to whom such a bill is tendered, has only to read it, need look no further, and has nothing to do with any private history that may belong to it. The policy which introduced this simple instrument demands that the *simplicity* of it should be protected." It was held in that case, that a note payable to a fictitious person which came to a bona fide holder, and which of course could not be indorsed on account of the fictitious payee, might be treated by the holder as against the real signers, as if it was made payable to bearer.

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Nor am I able to hold that it was the *effect*, much less the *intention* of the provisions of the code, to abrogate, change, or in degree to modify this almost uniform body of commercial law so in use in nearly all commercial states and countries with whom we hold intercourse, repeal the statute which has adopted the custom, and to make new and special provisions in it, *peculiar* to this state. The intent of the code of procedure, so far as the intent can be judged of from the title, was only "to simplify and abridge the practice, pleadings and proceedings of the courts of this state." There is certainly no such intent expressed, and neither the statute nor the common law are to be deemed abrogated, except by express statute enactment, or by necessary implication. By force of a maxim frequently applied in construction of statutes, "*expressio unius, est exclusio alterius*," the construction contended for would be *excluded*. The idea advanced is new, and extremely radical in effect. To simplify a system of practice, is entirely consistent with continuing in force all the established principles of the law itself that control the ordinary relations of business or commerce. The recital which precedes the code, equally with the title, *excludes* the idea that it was intended to overturn or unsettle a single principle of law, or any right of the citizen hitherto regarded as well defined by elementary writers and by a long series of common law adjudications. It would have created a deeper interest in the public mind, had it been understood that such a result could be wrought out of its letter or spirit; on the contrary, it seemed to me to *limit* its claim of change by saying: "Whereas it is expedient that the present *forms* of actions and pleadings, in cases at common law, should be abolished, and that the *distinction* between legal and equitable *remedies* should no longer continue, and that a uniform course of proceedings in all cases should be established; therefore," &c. It was not urged on the argument that it was the *intent* of the legislature to work a change in this branch of the law of the land, or of any other; but that it was the necessary *effect*

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of this provision by reason of the established maxim: "The reason of the law ceasing, the law itself ceases." I have attempted to show that by *excluding* all such *intent*, no such *effect* could follow; certainly not in a case when the reason for the existence of the law is not traced to a certainty, or limited to one single reason.

Upon the whole, I have come to the conclusion, that by the law of this case, George O. Warring was not an indorser; that he was not a guarantor, but was a joint promissor with the other defendants; and that the precise locality of his signature upon the note was immaterial. This construction makes it a plain, simple and intelligible contract, easily understood, has the basis of good sense to support it, and needs no strained construction nor aids of fiction to sustain it. What else was the end and object of the defendant's signature but a liability to pay in some form the sum promised? If there be a slight informality in the execution of the contract, he is not allowed to come into court and set up his own informality as a defense. The law will conclude he intended to waive this informality. Such a conclusion it appears to me is most conformable to the principles of natural justice, and establishes a policy that ought to operate on all commercial transactions. Bargains should be enforced, undertakings executed, and promises to pay performed; and the rule, that a man's own acts shall be taken most strongly against himself, applies with all its force in favor of the party who in confidence of its integrity has parted with his money upon the strength of it. "*Ratio legis, est anima legis.*" The plaintiff was therefore, I think, entitled to judgment for the amount of the note, and the judgment should be affirmed.

[SCHENECTADY GENERAL TERM, January 6, 1863. *Rosekrans, Potter, Boeckes and James*, Justices.]

COMFORT *vs.* FULTON and SOULES.

Severing and carrying away by one act, a growing crop of less than \$25 in value, is no criminal offense, unless charged to have been done maliciously; and if so charged, it is a misdemeanor, as a "malicious trespass;" but it is not stealing.

A justice of the peace has no right to issue a warrant of arrest, in a criminal case, upon a complaint stating the facts on information and belief, where the attendance of the person from whom the information was derived can be compelled.

Where a justice issues a warrant of arrest on a criminal charge, without sufficient evidence of the commission of the offense by the accused, the justice and the complainant are jointly liable, in an action for false imprisonment.

THIS action was brought to recover damages for an alleged false imprisonment. In October, 1859, Soules, one of the defendants, being then a justice of the peace, issued a criminal warrant for the arrest of the plaintiff, Comfort, upon the application of the other defendant, Fulton. On this application Fulton presented a written complaint, in which he alleged that a quantity of potatoes, worth three dollars, had been stolen from him, and that he had reason to suspect Comfort of having stolen them. Being orally examined, by the justice, he stated that the reason for his suspicion was, that his own son informed him that he had seen Comfort digging potatoes out of Fulton's ground, and carrying them off. On this evidence a warrant was issued against Comfort, who was tried before the justice and a jury, and finally acquitted. He then brought this action against the justice and Fulton, for false imprisonment, and recovered a verdict for \$50 damages. The defendants appealed from the judgment.

A. C. Niven, for the appellants.

Bush & Wells, for the respondent.

GOULD, J. There are two palpable defects in the original proceedings before the justice of the peace, either one of which renders his whole proceedings, in issuing the warrant, so ab-

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solutely without jurisdiction and void, that both defendants must be liable in this action.

1. Taking the affidavit of Fulton, as coupled with his oral examination, and the complaint really made before Soules, amounts to this: That Comfort had in one continued act dug and carried away Fulton's potatoes of some indefinite value, guessed at \$3. Such an act, at common law, is no criminal offense. Severing and taking away a growing crop, (by one act,) is but a trespass. By our statute (see and compare 3 *R. S.* 5th ed. 959, § 70; 971, § 1; and 973, § 15, div. 4,) such an act, if the property so severed and taken was of more than \$25 value, would be grand larceny; but if the property were of the value of \$25 or less, the act is no criminal offense, unless charged to have been done maliciously; and if so charged, it is a misdemeanor, as a "malicious trespass;" but it is not stealing. In the papers before us the charge is of stealing potatoes, of the value of \$3; and the warrant is for stealing—an offense which Fulton's oral examination actually and completely disproved.

2. The oral testimony taken by the justice, shows that Fulton, personally, knew nothing on the subject of the charge; and further, that his son, competent, accessible, and the only witness who could sustain the charge, did personally know all the facts, whatever they were. And while it is barely possible that so meagre a complaint as the written one in this case might sustain a warrant, if it were all the proof that could be produced before the justice, until an arrest should enable the complainant to enforce the attendance of witnesses; still a case where the justice had before him so little, with certain information that full knowledge was within his reach, is not one to be favored by any court which regards exemption from groundless arrest as one of the rights of the citizen.

As to the liability of both defendants: there can be no doubt of that of the justice; and the complainant was too conspicuous an actor in the whole proceeding to be sheltered behind the legal cover of the warrant. Indeed the jury might

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fairly infer, from the evidence, that the complainant's motives in asking for the warrant were malicious ; and that the justice understood the position of both parties, and was willing to gratify the complainant, both believing that they were responsible under the cover of the law. Both should be held responsible for an arrest so utterly without legal justification.

The charge of the judge, at the circuit, was in precise accordance with the views expressed above, and was not erroneous. The judgment must be affirmed, (and order refusing new trial, also. *Quære ?* as that is not appealed from.)

PECKHAM, J. The constitution of the United States provides that "no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (*Art. 4.*) I do not know why this is not the law of the land in state as well as in United States tribunals. It is in terms re-enacted in our bill of rights. (*1 R. S. 93.*)

In this case information from his son, by the complainant, was no proof whatever. It cannot be by possibility "probable cause supported by oath." It is no "oath or affirmation," within the meaning of the law. Had any fact been stated, so as to enable the magistrate to exercise his judgment as to the probable cause, he could not be made liable for an error in its exercise. Here was nothing more (nor so much in fact) than if the son had come into court and stated, without oath, that he saw this plaintiff commit the offense. That would not be claimed to be sufficient.

HOGEBOM, J. concurred.

Judgment affirmed.

[ALBANY GENERAL TERM, March 4, 1861. *Gould, Hogeboom and Peckham Justices.*]

CARTER *vs.* BURR.

Where a lessee has been evicted from a portion of the privileges granted by the lease, by a paramount title in a stranger, he is discharged from the rent *pro tanto*, and is entitled to an apportionment, by which rent shall be paid only in respect to the residue.

But in an action for rent, the lessee is not entitled to recoupe the value of the lease over and above the rent, nor for rents he might have realized, or for special damages incurred by reason of being evicted from a portion of the privileges granted.

A lease in fee, or in perpetuity, is a "conveyance of real estate" within the provisions of the statute forbidding the implication of covenants; and if it contains no covenants of seizin, warranty or quiet enjoyment, none can be implied.

THIS action was brought to recover rent claimed to be due under and by virtue of a lease in fee, bearing date the 19th day of January, 1842, and made and executed by the plaintiff to and with the defendant and one Archibald Hoyt. The rent accrued between the 1st day of August, 1850, and the first day of February, 1858. The premises were situated in the city of Troy. The defendant claimed that the plaintiff had broken various covenants in the lease, by reason of which the defendant had sustained damages to a greater amount than the rent claimed to be due.

The cause, together with another suit against Archibald Hoyt for his share of the rent and involving the same questions, were referred to Charles F. Tabor, Esq., as sole referee. Upon the trial of this case it appeared that the plaintiff made the demise in question to Archibald Hoyt and Oliver Burr, and therein agreed to erect a building of given dimensions, and also a water wheel to be used in connection with the building, and to be of good materials and of sufficient strength for the use of the power obtained from the natural stream upon the wheel. He also agreed to lay wood trunks sufficient to conduct the natural stream which then ran into the pond used by him, as a reservoir to said wheel, and to do all that was necessary to carry said stream of water to the top of the wheel. The building was to be erected on the

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west side of the stone dam, on the Hollow road leading to the Troy poor-house, and to be completed, with water wheel, on or before May 15, 1842. The plaintiff granted, demised and leased unto Burr and Hoyt, and their assigns, all of the building so to be erected, and the water wheel, and the natural stream of water, and certain land owned by the plaintiff, with the right to erect on the premises such buildings as might be necessary for making lampblack and boiling oil, and for storehouses; the building for making lampblack and boiling oil to be situated at least thirty feet from the main building, "for the term of five years from the 1st day of April next, or from such time as the premises shall be ready for use, with the express understanding and agreement between the parties aforesaid, that this lease shall be a perpetual lease, subject to the following proviso:" and that was that at the expiration of five years, or at any time thereafter, on one year's notice in writing, the lessees might surrender the premises and be thereafter absolved from all its conditions. For the first year the lessees were to pay \$240 a year, payable quarterly; thereafter Burr was to pay \$120, and Hoyt \$120 per annum. It was further provided that Hoyt was to occupy all of the building above the first story, and use one-half of the water power; and Burr was to use the remainder of the building and the parcel of land, and one-half the water power. It was further agreed that the plaintiff should make all such repairs on the building and water wheel, and shaft, as should become necessary from natural wear and decay. If they should become injured by the fault of the lessees, they were to repair the same. There were other provisions in the lease not material to the questions involved.

The defendant claimed that the plaintiff did not, after the 1st of May, 1850, furnish to the lessees the use of the water mentioned in the lease, whereby they were greatly obstructed in their business, and suffered damage to a large amount.

The plaintiff made the erections and improvements as

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provided in the lease. He also laid the wood trunk, and did all that was necessary to conduct the stream of water on to the top of the wheel, as therein provided. The trunk was about 150 feet in length and was laid in the highway, on the northerly side, until it crossed the same to the southerly side nearly opposite the demised premises, a greater part of it being on the northerly side.

The defendant under the clause in the lease entitling the lessees to make erections and improvements upon the demised premises, erected a building for the purpose of burning lamp-black, &c., which cost near \$2000, for use in connection with the water power, the value of which would be diminished if deprived of the water. The defendant and Archibald Hoyt, the other lessee, went into the occupation of the premises under the lease; the defendant occupying the lower and Hoyt the upper part of the building erected by the plaintiff, the defendant for the manufacture of printing ink and principally black ink, and Hoyt for the manufacture of India rubber cloth. The water power provided for in the lease was essential to the defendant, in said business.

In March, 1849, a Mrs. Haight, who was the owner of the land on the north side of the highway, claiming that the wood trunk passed over her land, shut the stream of water off from passing through the trunk. The plaintiff disputed her right to do so, and refused to make any arrangement with her. The business of the defendant by this means was wholly or partially interrupted, until on or about the 23d of April, 1849, during which time Mrs. Haight refused to grant any use of the water through the trunk, but at or about this time the defendant and Hoyt hired the water of her for \$50 a year, but she refused to lease for any definite period.

In the early part of the fall of 1850 the defendant also occupied, in the prosecution of his business, a part of a new building built by Hoyt, since which time he has not used the water passing through the trunk. In the fall of 1851 he hired another water power of one Tompkins and removed

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his machinery there, and since that time has manufactured his black ink at this place. He has however used the building erected by the plaintiff for some purposes connected with the business. So much of the stream as did not pass through the trunk ran into a reservoir of the plaintiff, and the defendant used water from it with the knowledge and assent of the plaintiff. Although the value of the building erected by the plaintiff and of the other portion of the premises occupied by the defendant, without water, was depreciated, yet the lease was valuable to the defendant over and above the rent he was to pay the plaintiff.

The defendant gave evidence showing the expenses resulting by reason of the removal of the machinery for manufacturing ink to the power hired of Tompkins ; and also evidence of the amount expended in the spring of 1852, for repairs on the wheel and the floor of the building. The evidence was conflicting, as to the capacity of the stream. The defendant never surrendered or offered to surrender the demised premises to the plaintiff, but continued in the occupation of them during the time for which the rent was claimed.

The referee decided that the lease was a perpetual lease, and not a lease for years, and that it was a conveyance within the statute against implied covenants. That the shutting off the water by Mrs. Haight was an eviction of the lessee from a portion of the demised premises by title paramount, and discharged the lessee from the rent *pro tanto*, and the defendant was entitled to an apportionment of the rent, and to an allowance of one-half of the repairs made by him and Hoyt, growing out of the failure of the plaintiff to repair. He also decided that the plaintiff was not bound to repair the trunk, and that the defendant was not entitled to recoupe the value of the lease over the rent ; or for rents he might have realized on underletting the premises ; or for loss of profits or cost of moving ; or for the decreased value of the building he put up on the demised premises, by reason of being evicted from the use of the water.

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The referee reported in favor of the plaintiff, allowing \$60 a year as a fair rent of the premises from which he was not evicted, including the water used from the plaintiff's reservoir, with interest quarter yearly, deducting one-half expended for repairs, and amounting to \$603.16. Judgment was entered in favor of the plaintiff for the amount, and the defendant appealed to the general term.

W. A. Beach, for appellant and defendant.

J. H. Reynolds, for respondent and plaintiff.

By the Court, MILLER, J. The principal question in this case arises in reference to the principle adopted by the referee in allowing damages to the defendant, by reason of his failure to enjoy the entire privileges granted by the lease. The referee decided that the defendant was entitled to an apportionment of the rent of the demised premises in consequence of the eviction, and to costs of repairs made by the defendant growing out of the plaintiff's failure to repair. He also held that the defendant was not entitled to recoupe the value of the lease over and above the rent, or for rents he might have realized, or for special damages incurred by reason of being evicted from the use of the water.

The defendant claims that, even upon the principle established by the referee, he did not allow an abatement of the rent equal to the value of the use of the premises from which he was evicted, relatively to the value of the part he retained, assuming the rent reserved as the standard of value. It is also contended that the principle of compensation adopted by the referee was wrong, and that he erred in refusing to allow the increased value of the lease, over and above the rent, and the special damages proven which were the immediate and natural consequence of the eviction.

In an action by the vendor against the vendee, where there has been a failure of title, a vendee cannot recover from

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the vendor the enhanced value of the premises. (*Baldwin v. Munn*, (2 *Wend.* 405.) The extent of a grantor's responsibility in such a case, under any and all the usual covenants in a deed, is the purchase money with interest. (4 *Kent's Com.* 476, 477. 5 *John.* 49. 12 *id.* 126. 12 *Wend.* 142.)

In *Kinney v. Watts*, (14 *Wend.* 41,) Justice Sutherland says: "A lease, where no purchase money is paid by the lessee, does not differ in principle in this respect from an ordinary conveyance in fee for a valuable pecuniary consideration. As the lessee has paid no purchase money he can recover none back upon eviction; and in respect to the improvements which he has made upon the premises, and the money expended upon them, he stands precisely upon the same footing with the purchaser, who recovers nothing for improvements or expenditures; nor can a lessee upon the ordinary covenants for quiet enjoyment.

There are cases which hold that where the lessor fraudulently or perversely refuses to give possession and when the refusal does not result from his inability to give possession, without fault on his part, the lessee may recover more than the amount actually expended. (See *Giles v. O'Toole*, 4 *Barb.* 261; *Lawrence v. Wardwell*, 6 *Barb.* 423; *Driggs v. Dwight*, 17 *Wend.* 71.) It will be noticed that in these cases the lessee had the power to give possession, and refused to do so, without any reasonable excuse.

In *Trull v. Granger*, (4 *Seld.* 115,) it was held that where the lessor had leased and delivered possession of the premises to another party, the original lessee was entitled to recover the difference between the rent reserved and the value of the premises as the *measure of damages*. Judge Gardner, in delivering the opinion of the court in this case, recognized a distinction between cases where the injury arose from the wrongful act of third persons, and cases where the lessor denied the right and refused to permit the lessee to occupy in accordance with the terms of the lease.

In *Kelly v. Dutch Church of Schenectady*, (2 *Hill*, 105,)

which was an action on a covenant in a lease, it was decided that the lessee could recover nothing for improvements, rise in the value, &c. The rule in regard to a purchaser of real estate was held to apply. It is there said by Bronson, J.: "In case of eviction the rent ceases, and the lessee is relieved from a burden, which must be deemed equal to the benefit which he would have derived from the continued enjoyment of the property. Having lost nothing he can recover no damages. He is, however, *entitled to the cost he has been put to*; and as he is answerable to the true owner for the mesne profits of the land for a period not exceeding six years, he may recover back the rent he has paid during that time, with the interest thereon."

In *Noyes v. Anderson*, (1 *Duer*, 342,) in an action to recover damages for the eviction of the lessee by a paramount title, the same distinction is recognized. Bronson, J. says: "Where it," (the conduct of the lessor,) "is fraudulent, the defrauded party, in an action on the case founded on fraud, may recover the value of his bargain, and any special damage which has resulted from the fraud." This rule applies even in cases where there is a covenant for quiet enjoyment. (*Sedg. on Damages*, 165, 166, 2d ed.)

In the case at bar, however, I am inclined to the opinion that the statute forbidding the implication of covenants applies. It provides that no covenant shall be implied in any conveyance of real estate, whether such conveyance contains special covenants or not. (1 *R. S.* 738, § 140.) The lease under which the defendant entered into possession, and by which a rent is reserved, is a grant in fee or a lease in perpetuity. The lessee and not the lessor may consider it forfeited, and it may continue forever. (*Folts v. Huntly*, 7 *Wend.* 210.) It did not convey a "chattel real," but was a "conveyance of real estate" within the provision of the statute, in regard to the implication of covenants. (1 *R. S.* 738, § 140. *Id.* 750, § 10.) As it contained no covenant

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of seizin, warranty or quiet enjoyment, none can be implied. (*The Mayor &c. v. Mabie*, 3 Kern. 158.)

The referee having found that there was an eviction as to the water, by a paramount title in a stranger, and no exception having been taken to his decision in this respect, by the plaintiff, it cannot now be reviewed upon the defendant's appeal. Even if he erred in this finding, it must be assumed, for the purposes of this case, that the lessee has been evicted, in accordance with the referee's finding, from a portion of the privileges granted by the lease, without any fraud or bad faith, on the part of the lessor.

The only remaining question is, what damages should be allowed to the defendant?

Assuming that there was an eviction as to the water, by a stranger, by a title paramount to the lessor's without any fault of the plaintiff, the defendant was entitled to an apportionment of the rent. The rule in such cases is correctly laid down in 8 *Bacon's Abr.* p. 514, *tit. Rent*, as follows: "If the lessee is evicted of a part of the land demised, by a stranger, on title paramount, it operates as a suspension of the rent, *pro tanto*, and the rent is apportionable and payable only in respect to the residue." (*See also Parton v. Jones*, 2 Iredell, 350; *Gilbert on Rents*, 173.)

In *Lawrence v. French*, (25 Wend. 443,) it was held that when the premises were demised at a fixed rent, and the tenant enters, but is prevented from obtaining the whole premises by a person holding a part under a prior lease executed by the landlord, the latter has no right to distrain for a proportionate part, but is entitled to sustain an action for use and occupation of the premises and recover under a *quantum meruit*.

Ch. J. Nelson says: "It is a familiar rule that if the landlord enter wrongfully upon or prevent the tenant from the enjoyment of a part of the demised premises, it suspends the whole rent until possession is restored. The rule is otherwise where a part is recovered by title paramount to the

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lessor's; for in that case he is not so far considered in fault as that it should deprive him of a return for the part remaining. The law therefore directs an apportionment of the rent." (6 *Bac. Abr.* 44, *tit. Rent*, *L. Gilbert on Rents*, 173. *L. & T.* 214, 219. *Bradley on Dist.* 24, 30.) It will be seen that a wide distinction is recognized between cases where the landlord enters wrongfully and where a portion of the premises is recovered by title paramount to the lessor's. (See *Hegeman v. McArthur*, 1 *E. D. Smith*, 148; *Christopher, ex'r, v. Austin*, 1 *Kern.* 218; *Ludwell v. Newman*, 6 *T. R.* 458; *Tomlinson v. Day*, 2 *Brod. & Bing.* 680; 2 *Starkie on Ev.* 630; *Dyett v. Pendleton*, 8 *Cowen*, 730; *Neale v. Mackenzie*, 12 *Cr., M. & R.* 84.)

I think the referee apportioned the rent in conformity with the doctrine laid down in the cases above cited, and that the defendant was allowed all the damages to which he was legally entitled. The referee deducted \$60 annually, being one-half of the annual rent, on account of the deficiency in the water, which was the only disturbance complained of. He thus allowed the \$50 paid Mrs. Haight and even beyond the amount actually expended by the defendant in procuring the water. He also allowed the expenses incurred for repairs on the water wheel and floors, which the plaintiff was bound to make. This would appear to be the only real damage and actual loss sustained that could legally be allowed. The value of the lease over and above the rent agreed upon, the loss of profits in business, the expense of moving machinery and other items claimed, were not proper items of damages to be considered; nor was the plaintiff responsible for them.

The defendant had a right to terminate the lease by giving one year's notice of his intention to do so. He was content to remain and abide by its terms and conditions, and has no reason to complain if he pays a fair rent for the premises, in accordance with the agreement, deducting what it would cost per annum to retain the water to which he was entitled.

In fixing the value at \$60 annually, and in adopting this

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standard, the referee allowed for and included the water used by the defendant from the plaintiff's reservoir, and by his permission and consent.

Although the plaintiff was bound to furnish water to be carried in wood trunks according to the conditions of the lease, yet having furnished the water otherwise than as provided for, I do not see why its value should not be considered in arriving at the amount of damages actually sustained by the defendant. Even if the agreement gave no such right, and the plaintiff does not ask in the complaint to recover that account, yet having given permission to the defendant to use the water for the purpose of supplying the deficiency created, the plaintiff would not be entitled to recover in another action for its use. So long then as the defendant availed himself of the advantages derived from the use of the water with the plaintiff's assent, there is no good reason why its value should not be allowed.

Considering all the facts, I do not feel at liberty to say that the amount of rent allowed by the referee was extravagant and exorbitant, or beyond the fair value of the premises after deducting all damages that could properly be set off. So far as the evidence showed what the actual loss sustained by the defendant was, the referee was better qualified to judge than an appellate tribunal; and as he has not adopted an improper or an illegal basis in deciding that question, there is no good reason for disturbing the conclusion at which he has arrived.

The judgment entered upon the report of the referee should be affirmed.

[ALBANY GENERAL TERM, May 5, 1862. *Hogeboom, Peckham and Miller, Justices.*]

BOWMAN *vs.* CORNELL, sheriff &c.

Where a sheriff neglects to collect and return an execution within the time prescribed by law, he is liable to the plaintiff in the judgment for the damages sustained by his neglect; unless he can show that the defendant in the execution had no property out of which he could have collected the debt. The action against the sheriff, in such a case, is founded upon his neglect to return the execution, and the amount of the execution is the measure of damages.

When a right of action has accrued against a sheriff, for neglecting to return an execution, such right cannot be divested by an appeal being taken from the judgment, by the defendant therein, even though the appeal be brought prior to the commencement of the action.

APPEAL from a judgment entered upon the report of a referee. On the 17th of July, 1860, the plaintiff recovered, in the Rensselaer county court, a judgment upon appeal against the Troy and Boston Rail Road Company, for \$111.88. On the 6th of August, 1860, an execution was duly issued and delivered to the defendant, then sheriff of Rensselaer county, for collection. The Troy and Boston Rail Road Company, at the time the execution was delivered to the defendant, and for more than sixty days thereafter, were visibly solvent, and the execution perfectly collectible within Rensselaer county. The sheriff never levied, collected or returned the execution. On the 12th of October, 1860, sixty-seven days after the delivery of the execution to the sheriff, the plaintiff demanded the money of the sheriff, upon the execution, and upon his refusal to pay, on the same day commenced this action. After the summons herein had been issued and sent for service, but before it was actually served, the Troy and Boston Rail Road Company, on the said 12th of October, 1860, served notice of appeal from the judgment of the county court to the general term of this court; but down to the said 12th of October no appeal had been brought, and the sheriff's proceedings, on his writ, had in nowise been hindered or stayed. The action, by consent, was referred to George Van Santvoord. The referee reported in favor of the plaintiff; and on the report a judgment was entered, on the

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4L	185
11h	568
13h	542

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9th day of September, 1861, for \$210.85. Exceptions were filed to the referee's report, and from the judgment entered thereon, the defendant appealed to the general term of this court.

C. H. Denio, for the defendant and appellant.

W. A. Beach, for the plaintiff and respondent.

By the Court, MILLER, J. When a sheriff neglects his duty and fails to execute process in his hands within the time required by law, when unrestrained by the order of the court or by law, he is allowed but one defense, and that a good excuse for not doing it, to wit, that the defendant had no property out of which he could have made the money had he endeavored ever so faithfully to do so. The law assumes that the debt is lost to the plaintiff if the officer having an execution against the debtor who has abundant means to pay, does not collect it. (*Ledyard v. Jones*, 3 *Seld.* 550.)

In this case a period of sixty-seven days has elapsed since the execution was issued to the sheriff, and no action has been taken by the defendant to stay the collection of the execution. Primarily the defendant was liable for not collecting and returning the execution, and a right of action had accrued against the sheriff to recover the damages sustained by reason of it. The action is founded on the neglect of the sheriff, and the amount of the execution is the measure of damages. (*Sedgwick on Damages*, 516, 519, 2d ed. *Bank of Rome v. Curtiss, sheriff, &c.* 1 *Hill*, 275. *Pardee v. Robertson*, 6 *id.* 550. *Ledyard v. Jones*, 3 *Seld.* 553) The gist of the action is the neglect to return the execution. (*Nelson, Ch. J.* 6 *Hill*, 553. The right of action having accrued, immediately at the expiration of sixty days, and the party being then entitled to recover the amount of his judgment, can it be divested by an appeal being taken from the judgment by the defendant in the execution, even although the appeal is brought prior to the commencement of the action ?

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It is provided by section 339 of the code, that whenever an appeal is perfected, &c. "it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein." Under this provision of the code it has been decided that an appeal from a judgment, although accompanied by a proper undertaking, does not *per se* supersede an execution previously levied on personal property. (*Cook v. Dickerson*, 1 *Duer's Rep.* 679. See also *Matter of Berry*, 26 *Barb.* 56; *Smith v. Allen*, 2 *E. D. Smith*, 259.) It has also been held that the giving of an undertaking with security sufficient to stay the proceedings, is not a defense to an action previously commenced on the undertaking given on the appeal to the general term; but the defendant might on motion obtain a stay of proceedings in the action, until the decision on the appeal. (*Burrall v. Vanderbilt*, 6 *Abb.* 70. 1 *Bosw.* 637.) The court say: "The case before us is not a proceeding upon the judgment." This action is not a proceeding upon the judgment. It is an independent remedy provided by law, and cannot be said to be connected with it, or a matter embraced within the provisions of the code. The judgment debtor can have no interest in the defense of the action, and no remedy exists against him. Even if it did follow that the plaintiff might recover the judgment twice if successful in the suit upon which the execution issued, I do not see how this argument can help the defendant. The same difficulties would exist had an appeal been taken without security; and such an appeal would not have been a defense in an action against the sheriff. The trouble with the defense is that the time to return the execution had expired before the appeal was brought. The liability of the sheriff, and the right of action of the plaintiff, had become fixed. The sheriff had never made a levy under the writ. It had expired in his hands, and was of no avail for any purpose. By his own act and neglect, he had voluntarily placed himself in a position where he could not proceed to collect the execution, and where it would not protect him as against the

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defendant, had he done so. The situation he occupies arises from a neglect to perform his duty, and by his own free act and choice.

No one but himself is responsible for it, and I do not see what right the defendant in the execution has to interpose, or that he is in any way affected by the result. Nor is it any answer to say that the right of action accruing by reason of the neglect of the sheriff to return the execution should have been asserted before the appeal was taken. I think it is sufficient that it existed when the suit was brought, and if there is no positive statute to prevent its being enforced after an appeal, there is no good ground for this position.

Whether the appeal would have been a proper ground to apply to the court for a stay of proceedings in the suit until it could be heard, it is unnecessary, perhaps, to inquire, as in the view I have taken it is not an available defense. Perhaps the decision of such a motion might depend upon facts which are not now presented. But as an opinion is not called for in the present aspect of the case, I forego any expression upon that point.

While the law extends its beneficent protection to public officers in a proper discharge of their duties; while it is ever lenient in shielding them from prosecution when circumstances indicate an honest and a bona fide effort to execute its process; yet it does not sanction an entire failure to perform an imperative duty. It does not willingly permit a sheriff to assume the responsibility of keeping process in his hands until the time for its execution and return has expired, and thus to delay and defeat its prompt and legal service without proper cause. And when an officer has thus violated a plain requirement, it should not attempt to sustain and to shield him from the penalty incurred by the wrong, by a forced and loose construction of a statutory provision. In this case the sheriff, without taking a single step, and without any apparent or satisfactory excuse, suffered the execution to run out in his hands. He has no equities, certainly, upon the con-

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sideration of the court, and no claim for exclusive protection, and must abide the consequences of his own conduct.

I think the decision of the referee was correct, and the judgment should be affirmed, with costs.

[ALBANY GENERAL TERM, May 5, 1862. *Hogeboom, Peckham and Miller, Justices.*]

THE PEOPLE vs. LUTHER J. MCCOY.

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29h 153

A recognizance taken in a criminal case, conditioned that the prisoner shall appear at the next court of oyer and terminer, to answer to an indictment; that he shall "not depart without leave of the court;" and that he shall "abide its order and decision," by its terms requires, substantially, his appearance on the first day of term and *de die in diem* during its continuance, unless discharged by the court.

The obligation to appear at the next court of oyer and terminer is not answered by an appearance on the first day of the term, or by appearing and submitting to a partial trial.

The meaning of the condition is not that the prisoner shall simply submit to a trial, but that he shall at all times until surrendered, or ordered into custody, submit himself to the jurisdiction or authority of the court; and that he shall be held to answer during the whole term of the court, and until the trial is ended.

If the prisoner appears in court, answers when called, and without having been surrendered by his bail, or ordered into the custody of the sheriff, enters upon his trial, but before the same is finished he departs from the court without leave, and does not return again to abide the order and decision of the court, his recognizance is forfeited.

Where a recognizance is taken in the proper court of oyer and terminer, and is returnable "at the next court of oyer and terminer," the fair interpretation of the words employed is that the court of oyer and terminer of the county where the indictment was found, and where it could be tried, and in which the recognizance was taken, is intended, and therefore the recognizance is not void for uncertainty.

THIS was an action on a recognizance and was tried before Justice SUTHERLAND and a jury, at the October circuit, 1861, in Rensselaer county. The recognizance was taken before the Rensselaer oyer and terminer, and is as follows :

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"The People vs. James L. McCoy. May oyer and terminer, 1860. The prisoner as principal, and Luther J. McCoy as bail, appeared in court, and acknowledged themselves indebted to the people of the state of New York, each in the sum of three thousand dollars, to be levied of their respective goods and chattels, land and tenements, to the use of the said people, if default shall be made in the following condition: The condition of this recognizance is such, that if the above bounden James L. McCoy, the prisoner, shall personally appear at the next court of oyer and terminer to answer to his indictment for burglary and grand larceny, and shall not depart without leave of the court, and abide its order and decision, then this recognizance to be void, otherwise full of force and virtue." The complaint alleged that the prisoner did not appear at the next court of oyer and terminer in Rensselaer county, but made default, and the recognizance was forfeited and ordered to be prosecuted. The answer set up that McCoy the prisoner appeared in court, answered when called, and did abide the order and decision of the court by submitting to be there tried; that he continued in court the entire day on the 9th of October, 1860, and was taken charge of by the court. That the trial being unfinished the court adjourned from the 9th to the 10th of October, without making any order as to taking him into custody, and without taking him into custody, and that without the knowledge, consent or connivance of the defendant, he departed from said court and failed and refused to return again into court.

It was admitted on the trial by the counsel for the defendant, that the recognizance was estreated and ordered to be prosecuted, as charged in the complaint, on the 10th day of October, 1860. The plaintiff then rested. The defendant then proved that at a court of oyer and terminer held in the county of Rensselaer, in October, 1860, James Luther McCoy was tried upon the indictment mentioned in the recognizance. The trial was moved by the district attorney on the 9th of October, 1860, in the morning. The defendant in the in-

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dictment was called, on motion of the district attorney. He answered and was present in court. A jury was impaneled to try the indictment, and the trial commenced and continued till the close of the day on the 9th. The district attorney was engaged in introducing evidence for the people on the whole of that day. James L. McCoy sat by his counsel the whole of that day, and his counsel cross-examined the people's witnesses under his direction. He continued in court until the court adjourned. The court adjourned at evening, without concluding the trial, until the morning of the 10th at 9½ o'clock. At the adjournment of court, the defendant was in court. The court made no order as to the custody of the defendant, and the sheriff took no control of him, and no control was exercised over him by the court. He went out of court at the same time that his counsel did, by his side. At the opening of the court on the morning of the 10th, at 9½ o'clock, the prisoner was not there. He was called and did not answer. He never appeared in court again. He went at large and escaped. The testimony here closed, and the counsel for the respective parties then summed up. The court charged the jury that the plaintiff was entitled to a verdict; to which charge the defendant's counsel excepted. The defendant's counsel then requested the court to charge the jury that the evidence showed that the defendant's duty under the recognizance had been fulfilled. The court refused so to charge; to which ruling the defendant's counsel excepted.

The jury rendered a verdict in favor of the plaintiffs for \$3000, and an order was made that the defendant have time to prepare and serve a case and exceptions, and that the exceptions be heard in the first instance at the general term.

M. I. Townsend, for the defendant.

G. Van Santvoord, for the plaintiffs.

By the Court, MILLER, J. It is contended that the condition of the recognizance has been fulfilled. That the prisoner

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placed himself under the power and control of the court, and in the custody of its officers, by appearing to answer the indictment, and entering upon his trial, and he was thereby surrendered, and the surety became discharged. The condition of the recognizance was not only to appear at the next court of oyer and terminer to answer to an indictment for burglary and larceny, but also that he should "not depart without leave of the court," and that he should "abide its order and decision." The prisoner did depart without leave, and did not appear to abide the order and decision of the court, and his recognizance was duly forfeited. His default cannot be excused unless the performance of the condition has been rendered impossible by the act of God, or of the law, or of the obligee. (*The People v. Bartlett*, 3 Hill, 570. *The People v. Manning*, 8 Cowen, 297.) It is no answer to a suit on the recognizance to say that he appeared and was ready to answer, if at a subsequent day of the court he did not appear when demanded. It was his duty to remain until discharged by the court. (*The People v. Stager*, 10 Wend. 431.) He forfeits his recognizance if he departs without leave.

The obligation to appear at the next court of oyer and terminer is not answered by an appearance on the first day of the court, or by appearing and submitting to a partial trial. The terms of the recognizance require, substantially, the appearance on the first day of term and *de die in diem* during its continuance, unless discharged by the court. Whether he is called on the *first day or not*, he must remain and be ready to answer on any subsequent day, whatever may be alleged against him. (*The People v. Blankman*, 17 Wend. 256.) It can scarcely be said that he has placed himself entirely in the control of the court, because the trial had commenced, when he had not been either surrendered by his bail, or ordered into the custody of the sheriff. He was not called to answer under the recognizance, and was not substantially in the power of the officer or court to whom the appearance was due,

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within the meaning and intent of the condition. The recognizance does not intend that he shall simply submit to a trial, but that he shall at all times until surrendered, or ordered into custody, submit himself to the jurisdiction or authority of the court. It is intended to hold the prisoner to answer during the whole term of the court, and until the trial is ended. Such is the uniform practice, and it would be extraordinary to compel a prisoner to renew his recognizance at the commencement of his trial, for the remainder of the term. In fact if this practice should obtain I see no reason why the same process should not be required at the opening of the court on each day. He is not only bound to appear and answer the indictment, but "he is not to depart without leave, and is to abide its order and decision." Can it be said that he fulfills these requirements when he leaves before the trial is ended, and when he is not present to abide the order and decision of the court upon the final termination of the trial? The object of the recognizance has not been answered. The condition has not been performed. The appearance of the prisoner has not been secured, and the surety is liable to pay the penalty.

In the case of *The People v. Stager*, (10 *Wend.* 431,) the people had the prisoner in their power. He was arrested and in custody, and the bail had every reason to believe that they were discharged. The principal did in fact appear, and answer the indictment against him, and was as much in custody as if he had been surrendered. In *Bradford v. Consaulus*, (3 *Cowen*, 128,) the consideration of the bond had failed by the prisoner's arrest on a criminal charge. The act of the law rendered the bond null and void, and of course as there was no obligation there could be no forfeiture. In both of these cases there was a substantial arrest or taking of the body into the custody of the court or its officer according to law, and the condition had been virtually fulfilled. The decision of the court in neither of these cases sustains the position con-

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tended for, and I am of opinion that the objection considered cannot prevail.

It is also insisted that the particular court of oyer and terminer at which the prisoner was bound to appear, is not named in the recognizance, and hence it is void for uncertainty. This point does not appear to have been presented separately to the court below, and perhaps cannot be properly raised under the general exception to the charge of the judge. But I do not think it is well taken otherwise. In *Grigsley v. The State*, (6 *Yerger*, 354,) the recognizance was to be void on condition that the prisoner make his personal appearance *here* on the first Thursday after the first Monday of February next, &c. The scire facias issued recited that it was to be void on condition that the prisoner make his appearance in court. It was held that under a plea of *nul tiel record* the variance between the record and scire facias was fatal. The decision was put upon the ground that no court was mentioned in the recognizance, and the court could not gather from it alone, in what court it was taken, or where, or before what tribunal the prisoner was bound to appear; and as the terms of the undertaking contained in the recognizance did not require the defendant to appear before the circuit court in which it was taken, he could not be said to have forfeited his undertaking by failing to appear.

This case is distinguishable from the one now considered. The expression employed was quite general. It was not returnable before any court, and none is designated in it. Besides, the point arose on a plea of *nul tiel record* to a scire facias. Upon principle, also, I think there is a wide difference. The recognizance upon which this action is brought was taken in the court of oyer and terminer of Rensselaer county, and conditioned for the appearance of the prisoner at *the next court* of oyer and terminer. The indictment was found in Rensselaer county, and the court of oyer and terminer of that county, and none other in the state, had jurisdiction to try the prisoner on the indictment. It was clearly

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the intention that he should appear there, and it appears that he did so appear in pursuance of that intention, and submitted to a partial trial. The next court of oyer and terminer mentioned could not have meant a court which had no jurisdiction to try the offense. The recognizance being taken in the proper court, and in the court of oyer and terminer, and returnable at the next court of oyer and terminer, I think the fair interpretation of the words employed is that the court of oyer and terminer of the county where the indictment was found, and where it could be tried and where the recognizance was taken, was intended. No other reasonable construction can be placed upon the words employed, and this is apparent on its face. For the reasons given, a new trial should be denied, with costs.

[ALBANY GENERAL TERM, May 5, 1862. *Hogeboom, Peckham and Miller, Justices.*]

SPAULDING and HEMPSTEED vs. HALLENBECK and SPENCER.

The natural and obvious meaning of the words "representatives of a deceased person," as they are used in section 399 of the code, is, *executors and administrators*. *Heirs* are not the representatives of their ancestor, within the meaning of that section.

The admissions of a grantor in a deed, against his own interest, and tending to establish a sufficient consideration for the deed, he being an original party to the record and identified in interest with the plaintiffs, are admissible in evidence against the plaintiffs, as part of the *res gestæ*.

In an action by the heirs of a grantor, against the grantee, to recover possession of the land, for a breach of the condition upon which it was conveyed, the declarations of the grantor, showing a performance of the condition, are admissible.

Where a deed was conditioned for the support and maintenance of S. and his wife, the grantors; *Held*, in an action, by the heirs of the grantors, to recover the premises for a breach of the condition, that it was not erroneous to charge the jury that if S. had expressed himself satisfied with the manner in which he was treated by the grantee, it was to that extent a waiver of a strict performance. And that the charge must be deemed confined to the time when the admissions were made, and not as embracing a subsequent period.

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Where a deed was upon the express condition that the grantee should keep, maintain and support the grantors, and that if he failed to do so, the conveyance should be void and the premises revert back to the grantors; *Held* that the condition involved a forfeiture of the premises, upon a failure of the grantee to perform, and was intended as a security in the nature of a penalty for its performance. That it was a condition subsequent, and upon failure to fulfill, the grantors had a right to re-enter upon the premises.

In such a case it is proper for the judge to leave it to the jury to determine whether the grantee intended, in good faith to perform, and had substantially performed, the condition of the deed; and that a substantial compliance with the contract would save the forfeiture.

Courts of equity will relieve against penalties and forfeitures.

MOTION for a new trial, on a case, with exceptions. The action was brought by Ezra Spaulding to recover the possession of a farm of land in the town of Fulton, Schoharie county. During the pendency of the action Ezra Spaulding died, and the action was continued by order of the court in the name of the plaintiffs, who were his heirs at law. The case was first tried before Justice HOGBOOM and a jury, and a verdict was rendered in favor of the plaintiff, which was subsequently set aside and a new trial granted. (*See 30 Barb. 292.*) The cause was tried again before the same justice and a jury, in May, 1860, and a verdict was rendered in favor of the defendants. It appeared on the trial that on the 24th day of March, 1860, Ezra Spaulding and his wife, being the owners of the premises in question, duly executed and delivered to the defendant Hallenbeck a warranty deed thereof, which deed recited that it was in consideration of the covenants and conditions thereafter contained. The conditions specified in the deed are as follows: "This conveyance is made upon the express condition, and the consideration of the above conveyance is, that the above named David Hallenbeck is to and agrees to keep, maintain and support the said Ezra Spaulding, the party of the first part, and the said Jenny his wife, during their natural lives, both in meat, drink, clothing, nursing, care and attention, both in sickness and in health, doctoring suitable and convenient for people of their

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age, and at all times to use them, the said Ezra Spaulding and Jenny his wife, kindly and proper for people of their age. And if the said David Hallenbeck shall at any time after the ensealing and delivery of this conveyance, fail to perform and keep the said Ezra Spaulding and Jenny his wife, according to the manner and condition above expressed, then this conveyance be void, and the land herein conveyed revert back to the said Spaulding and wife, the parties of the first part, they, the said Spaulding and wife, binding themselves to pay the said David Hallenbeck, the party of the second part, for what time he shall then have so kept them, the said Ezra Spaulding and wife, according to the above agreement, above what the use and occupation of the said place has or shall then have been worth, if any more shall be due to said Hallenbeck." The defendant Hallenbeck entered into possession under the deed immediately, and maintained and supported the grantors according to the condition until the 9th day of June, 1856, when Ezra Spaulding's wife died. Spaulding continued to reside with Hallenbeck until the 22d day of August in the same year, when he voluntarily left. There was some conflict of evidence as to whether Hallenbeck did support Spaulding and wife in accordance with the condition of the deed. Upon the trial the defendant Hallenbeck was sworn as a witness on his own behalf. Objections were taken by the plaintiffs to his evidence, upon the ground that he was a party defendant, and that the plaintiffs were the representatives of a deceased person. The judge ruled that he was competent, and the plaintiffs' counsel excepted. Evidence was given on the trial of the declarations of Ezra Spaulding, deceased, which were objected to by the plaintiffs' counsel as hearsay and as irrelevant, and the objection overruled, to which decision exception was duly taken. The justice charged the jury, amongst other things: "That this action is brought to recover the farm in question by the plaintiffs, the heirs at law of Ezra Spaulding, deceased. The defendant Hallenbeck claims title under a deed exe-

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cut by Ezra Spaulding and wife, dated March 22d, 1856. This deed, if it was executed by the grantors and delivered to the grantees, showed upon its face a sufficient consideration to pass the title to the defendant Hallenbeck, if occupied by the defendant Hallenbeck, and was binding upon the parties thereto at the time of its delivery and acceptance." (To which plaintiffs' counsel excepted.) "That if the defendant Hallenbeck had failed to perform the conditions of the deed, then and in that case the deed became void, and the plaintiffs would be entitled to recover; but if the jury were satisfied from the evidence that the conditions of the deed had, in all respects, been substantially performed by the defendant Hallenbeck, then the plaintiffs were not entitled to recover. (To which the plaintiffs' counsel excepted.) That if the jury believed Ezra Spaulding was satisfied with his treatment, and so expressed himself, it would be a waiver of a strict performance of that which might otherwise be insisted upon as a forfeiture, if the evidence would warrant it. (To which the plaintiffs' counsel excepted.) That if defendant Hallenbeck intended in good faith to perform all the conditions of the deed, and has substantially performed them, it will be sufficient, for the law under such circumstances leans against forfeitures, (to which the plaintiff's counsel excepted;) but it is your duty to see whether there has been a substantial or intentional neglect on the part of Hallenbeck to keep the conditions of the deed; and [if there has been such neglect, the plaintiffs are entitled to recover.]" To which charge, except the last clause thereof in brackets, the plaintiffs' counsel excepted. The judge having his attention called to his charge to the jury, reiterated portions thereof, and further charged substantially as follows: "That the deed in question, introduced in evidence by the defendants, was upon the face good and valid and given upon a good and valid consideration, and if executed by the grantors and delivered to the grantees is sufficient to pass the title from Spaulding and wife, grantors, to the defendant Hallenbeck." To which

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and to every part of which charge of his honor the plaintiffs' counsel excepted. The judge also further charged the jury that said deed having been given by Spaulding and wife, and accepted by the defendant Hallenbeck, it became and was binding on the parties thereto, unless defeated by a subsequent failure to perform on the part of the defendant. To which and to every part of which charge the plaintiffs' counsel then and there duly excepted. The judge also further charged the jury that in order to entitle the plaintiffs to recover, inasmuch as the defendants had given considerable evidence tending to show performance, and inasmuch as the effect of non-performance was a forfeiture of the title, there ought clearly and substantially to appear from the evidence a breach on the part of the defendant Hallenbeck of the condition mentioned in the deed to be kept and performed by the defendant. To which and to every part of which the plaintiffs' counsel excepted. The judge also further charged the jury that if he, Spaulding the grantor, was in fact satisfied and expressed himself satisfied with the manner in which he was treated, it was to that extent a waiver of a strict performance by the defendant of the condition of the deed. To which and to every part of which the plaintiffs' counsel also excepted.

The jury found a verdict in favor of the defendants, and an order was made that the plaintiff have time to prepare and serve a case and exceptions, to be heard in the first instance at the general term.

H. Smith, for the plaintiffs.

J. K. Porter, for the defendants.

By the Court, MILLER, J. I think that the defendant Hallenbeck was a competent witness to prove the declarations made by the deceased. In *McCray v. McCray*, (12 Abb. 1-4,) it was decided that the natural and obvious meaning of the words "representatives of a deceased person," as they

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are used in section 399 of the code, is executors and administrators. That case presented the same question as the one now under consideration, and it is quite clear that the plaintiffs in this suit were not the representatives of a deceased person, within the meaning of section 399 of the code.

The declarations of Ezra Spaulding were competent evidence in the case. He was the grantor of the premises in question and a party to the contract embraced in the conveyance. He was an original party to the record and identified in interest with the plaintiffs. (1 *Greenl. Ev.* § 171.) The admission made by him was against his own interest and tended to establish a sufficient consideration for the deed. The evidence was a part of the *res gestæ*. (1 *Greenl. Ev.* § 109.) The plaintiffs attempted to prove that the defendant Hallenbeck had failed to fulfill the conditions of the deed. The defendants, to contradict this evidence, introduced the declarations of Spaulding, showing that he was entirely satisfied with his treatment by Hallenbeck. This was an important and a material issue in the case, and the declarations of the party were clearly admissible.

The remaining exceptions relate to the charge of the judge in submitting the case to the jury. The points raised as to the consideration and the validity of the deed from Spaulding and wife to Hallenbeck were fully considered and decided by the general term upon the former appeal, and must therefore be regarded as *res adjudicata*. (30 *Barb.* 292.) I shall therefore pass to a consideration of the other objections to the charge. It is insisted that the judge erred in charging the jury that Ezra Spaulding waived the conditions of his deed if he was satisfied with his treatment and so expressed himself; that the waiver, if there was any, could only have been up to the time he expressed himself, which was long before he left Hallenbeck; and that the omission to express dissatisfaction did not waive his right to insist upon a strict performance of the contract. I think the charge of the judge was sufficiently restricted, so as to confine it to the time when

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Spaulding expressed himself satisfied with his treatment. The fair and legitimate import of the words employed cannot be said to bear a different interpretation. In fact the judge stated explicitly, in his charge, that if he, Spaulding, was satisfied and expressed himself satisfied with the manner in which he was treated, it was to *that extent* a waiver of a strict performance by the defendant of the condition of the deed. It seems to me that this was a limitation of the charge and confined it to the time when the expressions were made. It was in substance submitting to the consideration of the jury the declarations of Spaulding as of the time when made, and qualifying them to *that extent*. It cannot, I think, be fairly claimed that the judge intended to charge that these declarations related to a period subsequent to the time when made, or that he meant they should bear any such construction. It seems to me that this portion of the charge was substantially correct. Nor do I understand that the charge embraced the proposition that Spaulding's omission to express dissatisfaction was a waiver of his right to insist upon a strict performance of the contract, or that it conveyed any such idea. If, however, the charge was not satisfactory, and the plaintiff had desired more definite instructions, he should have made a request for them. If he had considered the charge as uncertain in this respect and had wished the judge to limit it, he should have thus expressed himself, and I doubt not the judge would have so charged. But no such request was made, and it would be a forced construction—a perversion of the plain and true meaning of the charge (as I think it must have been intended and understood—) to hold that the language employed conveyed an erroneous impression to the jury. If there was any question the remedy was plain and the plaintiff should have asked for more pointed and more explicit instructions. As he failed to do so, I think there is no force in the objection.

It is claimed that the judge erred in charging the jury that a *substantial compliance* with the contract was sufficient to

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save the defendants from a forfeiture, and in leaving it to the jury to determine what was a substantial compliance with the contract. Assuming that the charge goes to the extent claimed, it involves the question whether the condition in the deed is a penalty or forfeiture intended as security for the performance of the contract, and whether the grantor had a right to insist upon a strict technical performance of the terms of the condition.

There is a class of English cases which would appear to hold that in all cases of forfeiture for a breach of any covenant other than a covenant to pay rent, no relief ought to be granted in equity unless upon the ground of accident, mistake, fraud or surprise, although the breach is capable of a just compensation. (*Hill v. Barclay*, 16 *Ves.* 402. 18 *id.* 56. *Reynolds v. Pitt*, 19 *id.* 134.)

It will be observed that the cases cited were actions of ejectment, founded on a breach of a collateral covenant in the lease, where it would be at least difficult to obtain an adequate compensation in damages, and where the equities appeared to be very much against the defendant. In 16 *Vesey*, 402, Lord Chancellor Eldon says: "There is no ground for relieving a tenant whose conduct with reference to his covenant has been gross and ruinous, that the landlord may be placed in the same situation by afterwards putting the premises in sufficient repair. How can it be ascertained that the subsequent repairs do put the landlord in the same state?" It was partially on these grounds that equitable relief was refused in the case last cited. But the doctrine sought to be established even in such cases is received with some hesitation in this country. (*Story's Eq. Jur.* § 1323. *Harris v. Troup*, 8 *Paige*, 425.) A distinction is attempted to be made, and where the condition of forfeiture is merely a security for the non-payment of rent, then it is to be treated merely as security in the nature of a penalty, and is relievable; but where the forfeiture arose from a breach of any collateral covenant, then courts of equity would not relieve. (*Story's Eq. Jur.*

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§§ 1320, 1321.) Great doubts however are expressed in regard to the soundness of the distinction between the two classes of cases as recognized in the English cases. (*Story's Eq. Jur.* §§ 1322, 1323. *vol. 2, p. 754, note 1.*) Mr. Justice Story in his Commentaries, also says: "Doubts have been expressed as to the solidity of the foundation on which the doctrine of affording relief in such cases rests. But whatever may be the origin of the doctrine, it has been for a great length of time established and is now expanded, so as to embrace a variety of cases not only when money is paid, but when other things are to be done and other objects are contracted for." (*See Story's Eq. Jur.* §§ 1313, 1314, 1315, *n. Skinner v. Dayton*, 2 *John. Ch.* 535.)

The principle laid down by Lord Eldon, in 16 *Vesey*, and sustained in the cases referred to, could not be regarded as applicable to the case under advisement, for the condition of the deed in the case at bar was doubtless intended as security in the nature of a penalty, and cannot in any way be considered in the light of a collateral covenant to repair under a lease, where no adequate compensation in damages could be obtained in an action for a breach of it.

The provision, in the deed from Spaulding and wife, was a condition subsequent; to be performed after its execution and delivery. No precise technical words are necessary to make a condition precedent or subsequent. The construction must depend upon the intention of the parties. (3 *Cruise's Dig.* 468, *tit. 32, ch. 24, § 7. Id. tit. 13, ch. 1, § 10. Blacksmith v. Fellows*, 3 *Seld.* 401.) It may depend upon the order or time in which the conditions are to be performed. (*Parmelee and others v. The Oswego and Syracuse R. R. Co.*, 2 *Seld.* 74.) If the condition does not necessarily precede the vesting of the estate, but may accompany and follow it, if the act may as well be done after as before the vesting of the estate, the condition is subsequent. (*Martin v. Ballou*, 13 *Barb.* 119, 133.) So if from the nature of the act to be performed and the time required for its performance, it is ev-

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idently the intention of the parties that the estate shall vest and the grantee perform the act, after taking possession, then the condition is subsequent. (*Underhill v. The Saratoga and Washington R. R. Co.*, 20 Barb. 455. 4 Kent's Com. 125, 126.) These conditions are not favored in law, and are construed strictly, because they tend to destroy estates, and the rigorous exaction of them is a species of *summum jus*, and in many cases hardly reconcilable with conscience. (4 Kent's Com. 129. *Ludlow v. The New York and Harlem R. R. Co.*, 12 Barb. 440, 444.) Courts of equity will never lend their aid to divest an estate for the breach of a condition subsequent. (4 Kent's Com. 130. *Livingston v. Tompkins*, 4 John. Ch. 415, 431.) Chancellor Walworth sustained this principle in *Livingston v. Stickles*, 8 Paige, 398. See also *Nicoll v. The New York and Erie R. R. Co.*, 2 Kern. 121.) Lord Hardwicke says, in *Rose v. Rose*, (Amb. 332,) "Equity will relieve against almost all penalties whatsoever; against non-payment of money at a certain day; against all forfeitures." It is a standing rule that a forfeiture shall not bind when a thing may be done afterward, or any compensation may be made. Forfeitures have always been considered as odious in the law, and courts of law, circumscribed as their jurisdiction is, struggle against them.

The deed in question is upon the express condition that the grantee shall keep, maintain and support the grantors, and if he fail to do so, according to the manner and condition expressed in the conveyance, it is declared to be void and the premises revert back to the grantors. This condition involves a forfeiture of the premises upon a failure of the grantee to perform, and it is quite apparent that it was intended as a security in the nature of a penalty for its performance. It was a condition subsequent, and upon a failure to fulfill its requirements the grantors had a right to re-enter upon the premises. It presents a case somewhat similar to one where rent is payable, and a right of re-entry is reserved upon its non-payment. If the grantee refused to comply with this

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condition he forfeited the estate. It was the penalty which he consented to accept as a condition of the grant. In all such cases equity will relieve; and applying this principle to the condition in this deed, there can be no doubt that it was a clear case where the doctrine of forfeiture in the nature of a penalty, applied, and that the charge of the judge was correct. He fairly left it to the jury to determine whether the defendant intended in good faith to perform and had substantially performed the condition of the deed, which I think was a correct disposition of the case.

A new trial should be denied, with costs.

[ALBANY GENERAL TERM, May 5, 1862. *Hogeboom, Peckham and Miller, Justices.*]

HONSEE vs. HAMMOND and others.

One in possession of land, under a contract to purchase, and entitled to a conveyance upon making the payments required, is virtually the owner, and may maintain an action to recover damages for injuries to his interest in the property, incurred while he was in the actual occupation and possession of the premises.

In such an action, evidence of the value of the premises, and of the cost of the buildings erected thereon, is competent for the purpose of showing the situation of the property, and the surrounding circumstances.

In such an action it is entirely competent for the plaintiff to prove the difference in the annual value of the property prior to, and since, the injury alleged, within the rule laid down by the authorities respecting opinions of witnesses.

The difference in the value of the property, at the two periods, is the proper rule of damages.

Riparian owners have no right to use their privileges in any way to the detriment of a proprietor on the stream below them. Although they have a right to use the water for all legitimate and proper purposes, they are not authorized to injure the owner below them, or in any way to interfere with his privileges.

Accordingly, where the owners of a tannery situated upon a stream threw tan-bark and other materials into the stream, thereby clogging the same and causing damage to the mills of the plaintiff situated lower down the stream;

39	80
62h	314
39	89
3l	282
9h	522
37h	183
39h	411

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Held that an action would lie for the injury, even though the damage was done by the defendants without any intent to injure, and in the usual manner in which water is used in tanneries.

APPEAL from a judgment entered upon a decision at circuit, and motion for new trial upon exceptions. The cause was tried before Justice HOGEBROOM and a jury, at the Sullivan circuit, in September, 1860. The action was brought to recover damages for injuries charged in the complaint and alleged to have resulted to the plaintiff from the wrongful acts of the defendant and his workmen, in throwing tan-bark and other materials into the stream upon which the plaintiff had a dam, saw-mill, turning mill, &c. The answer denies the allegations in the complaint, as to the ownership of the premises alleged to be owned by the plaintiff, and on which the saw-mill was built. The answer also sets up that the defendants own a tannery on the same stream, which was in operation before the saw-mill was built; and alleges that if in the ordinary business of the tannery, any bark was taken down the stream and lodged in the plaintiff's dam, it was a benefit to the same in tightening his dam.

It appeared upon the trial that the plaintiff was the owner and in possession of a valuable farm of land in the town of Neversink, Sullivan county, upon which were dwelling houses, barns and out-buildings, used for agricultural purposes. There were also on this farm a mill pond, a valuable saw-mill, turning mill and machinery, supplied with water through a race-way from the Neversink river, which ran through the farm of the plaintiff, and in which was a brush dam on the plaintiff's land, by means of which the water was turned into the mill-race and taken to the pond. Higher up, upon the same stream (about one-fourth of a mile) the defendants have erected and operate a tannery for manufacturing leather. From this tannery they threw into the stream their tan-bark, together with portions of the hair, skimmings, filth and refuse matter from their hides, which float directly down the stream into the mill-pond, saw-mill and machinery of the plaintiff.

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This practice was continued for some time, greatly impairing the working and usefulness of the plaintiff's mills, until it greatly injured the value of the mills. The plaintiff claimed to recover for the injury to the *freehold*, as well as for the injury to his possession, for the period occupied and used by him. The plaintiff proved his title and occupancy and possession for many years in the grantors of John Pierce, his immediate grantor. The sale to the plaintiff was by a contract or executory agreement, under which the plaintiff held and occupied until the commencement of this action, and in the mean time made payments and put up and erected permanent and valuable improvements, and cleared off and cultivated a large portion of the farm. From the year 1854 to the commencement of this action the plaintiff contracted to sell the saw-mill to different persons, each of whom took possession and commenced the manufacture of lumber. Each of the parties in turn threw up their contracts, and the mills came back upon the hands of the plaintiff. The plaintiff himself used the mills (exclusive of the periods when they were held under contract) about one year and four months, and his recovery was limited by the rulings of the court to the injury to his possession during this period. The mill and tannery were built about the same time.

The cause was then submitted to the jury under charge of the judge. The defendant's counsel asked the court to charge, that an action could not be maintained for throwing spent tan-bark into the river, when it was done without intent to injure, and in the usual manner in which the water was used at tanneries. The court refused to charge in this unqualified manner, and the defendant excepted. So far as this proposition involved questions of fact the court referred the same to the jury, and as to the questions of law referred the jury to the charge, to which the defendants excepted. The jury found a verdict in favor of the plaintiff for \$100. The other questions arising on the trial appear in the opinion of the court.

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A motion for a new trial was made and denied *pro forma* at special term, and judgment having been rendered on the verdict, an appeal was taken to the general term.

A. J. Parker, for the appellant and plaintiff.

H. R. Low, for the respondent and defendant.

By the Court, MILLER, J. The defendants interpose several objections to the decisions of the judge upon the trial.

First. It is contended that the plaintiff was not proved to be the owner of the premises, at the time of the alleged injury, as claimed in his complaint, and that he should have been nonsuited upon that ground. The plaintiff alleged that he was the owner and in lawful possession of the premises. The evidence showed that he had an agreement for the purchase of the property, and had taken and held possession by virtue of this and another agreement for some time prior to the commencement of the suit. That payments were made to his grantor, on his contract, and the property conveyed to him by deed, about the time of the trial. The plaintiff was virtually the owner of the premises. He was in possession exercising acts of ownership, and was entitled to a conveyance upon making the payments required. The damages incurred were sustained by him. The original grantor had sustained no loss. The injury was to the plaintiff alone. He had made large improvements on the property, and was seriously injured by the acts of the defendants. He was only allowed to recover for injuries to his interest while in the actual occupation and possession of the premises. As the possessor of the premises he was entitled to maintain the action. (2 *Greenl. Ev.* § 618. 1 *Ch. Pl.* 71. *Rathbone v. McConnell*, &c. 20 *Barb.* 311, 315.)

It is unnecessary to inquire whether as the holder of an executory contract he was entitled to recover for an injury to the freehold. It is sufficient that he had made out a case

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upon which to go to the jury, and, as the actual occupant and possessor, had been damaged. The judge was clearly right in refusing to nonsuit.

Second. I think the evidence of the value of the premises, and of the cost of the several buildings erected thereon, was competent for the purpose of showing the situation of the property and the surrounding circumstances. It was establishing the facts relating to the character of the property, which, in connection with other evidence, might tend to show how much injury might have accrued to the plaintiff. The value of the property was alleged in the complaint, and the evidence introduced sustained this allegation.

Third. The objections made to the evidence of John Decker, as to the injury and inconvenience sustained for two weeks after the witness had taken possession of the premises as a purchaser, are not well founded. The testimony had a bearing upon the question of damages. The plaintiff had been in possession of the premises immediately preceding the time when the witness entered, and it was competent to show the effect of the injury and the condition of the premises not only when the witness took possession, but within a reasonable time thereafter, for the purpose of giving point to and characterizing the other evidence upon this subject. It showed the general condition of the property at and about the time when the injury was caused, and ranging through the period for which the plaintiff claimed to recover damages. It is claimed that the jury could give no damages for this period, and had no right to infer that the plaintiff suffered the same damages during any other two weeks when the plaintiff was in possession. The evidence was not offered or received for any such purpose, and the damages were especially restricted by the charge of the judge to injuries resulting to the plaintiff's possession of the property while it was actually occupied by him. The objection to the evidence of E. L. Briggs involves very much the same question, and the same remarks are applicable. His evidence as to the condition of the prop-

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erty was confined by the judge to the time and immediately after the witness took possession, and the testimony was admitted as proper and competent for the purpose of showing the condition of the mill while in the possession of the plaintiff.

Fourth. The questions put to the plaintiff, who was examined as a witness on his own behalf, involve a more important and a more serious inquiry. He was first asked what the mill was worth annually. This was objected to because it called for an answer which was immaterial, and also as an improper rule of damages. The objection being overruled, the witness answered, it was worth one hundred dollars annually. The question was then put, What was its value as obstructed by tan-bark? The same objections were made to this as to the previous question, with an additional one, that there was no proof how much of the loss, if any, was chargeable to the defendants. The specific objection was not taken that the question called for the opinion of the witness; nor was it a distinct question as to the damages, within the principle laid down in *Dolittle v. Eddy*, (7 Barb. 74.)

Even if it did come within this rule, there is a distinction between an opinion based upon facts within the witness' own knowledge, and an opinion predicated upon the testimony of other witnesses. (*Spencer v. The Saratoga and Washington R. R. Co.*, 12 Barb. 382. *The Rochester and Syracuse R. R. Co. v. Budlong*, 10 How. 289.) I am inclined to think that it was entirely competent to prove the difference in the annual value of the property prior to and since the injury alleged, within the rule laid down by the authorities as to opinions. As to the objections actually made, (1.) It was material to show the difference in the value for which the plaintiff claimed to recover damages. (2.) The effect of the evidence was to prove what damages the plaintiff had actually suffered. The difference in the value would establish the amount of damages, and I think was the proper rule of damages. (3.) If there is any evidence showing that any portion of the injury had been caused by others, then the evi-

dence offered was of a character which tended to throw light upon the question of damages. It was in fact one way of ascertaining what the damages actually were and of submitting what amount, if any, the jury should award to the plaintiff under the evidence presented for their consideration, and the circumstances of the case.

Fifth. The evidence offered to be given by Henry Beardslee, that when he was in possession of the mill, the tan was a benefit rather than an injury, was properly rejected. (1.) It was too remote, being after the commencement of the suit, and some time after the injury accrued. (2.) It would be a mere matter of opinion upon facts existing at a different time from that when the damages were incurred. (3.) If it was competent in reference to the original period, it was not in regard to a subsequent time.

Sixth. I think the case was properly submitted by the judge to the jury, and there was no error in refusing to charge as requested by the defendants' counsel. The defendants were clearly liable for the injury, although the damages may have been done by them without any intent to injure. They had no right as riparian owners to use their privilege in any way to the detriment of a proprietor below them. Although they had a right to use the water for all legitimate and proper purposes, they were not authorized to injure the owner on the stream below, or in any way to interfere with his privileges. The maxim "*sic utere tuo ut alienum non lædas*" applies, and the judge very properly refused to charge as requested. (*Broom's Legal Maxims*, 277. *Thomas v. Brackney*, 17 Barb. 654.) The charge of the judge fully embraced the principles above laid down, and he very properly refused to charge that the action could not be maintained for throwing tan-bark into the river when it was done without intent to injure, and in the usual manner in which the water was used in the tanneries. The judge had previously charged that both parties had a right to the use of the water for all legitimate purposes; but that one riparian proprietor had no right so

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to use the water as to fill or clog it with foreign and noxious matter which would materially interfere with the use of the water below, and to the damage and injury of the owner, and thereby greatly impair or destroy the use of the property. The principle laid down was clearly correct, and the ruling of the judge in refusing to charge was entirely proper.

Finally. It cannot, I think, be fairly claimed that the verdict is against the evidence. The evidence is at least so far conflicting as to render it improper to interfere. The verdict must be entirely against the weight of evidence, to justify an appellate tribunal in setting it aside. The jury, whose province it was to weigh and pass upon the evidence, have decided that the preponderance was against the defendants. (*Culver v. Avery*, 7 *Wend.* 380.) A new trial will not be granted where the testimony is contradictory, and the character and credit of the witnesses questioned, on the ground that the verdict is against the weight of evidence. (*Winchell v. Latham*, 6 *Cowen*, 682.) There is certainly no such preponderance in the weight of the evidence as would authorize a new trial on that ground. The jury have decided the questions of fact in favor of the plaintiff, and there is no rule of law which allows us to interfere with, or to set aside, their verdict.

In view of all the facts and the questions raised, a new trial must be denied, and the judgment below affirmed with costs.

[ALBANY GENERAL TERM, May 5, 1862. *Hegeboom, Peckham and Miller*, Justices.]

JULIAND *vs.* RATHBONE and DARLEY.

Section two of the act of 1860, respecting assignments for the benefit of creditors, requiring an assignor, within twenty days after the date of an assignment, to make and deliver to the county judge an inventory of his debts and assets, and section three, requiring the assignee, within thirty days after the date of the assignment, to give a bond conditioned for the faithful discharge of his duties, are *directory* merely; and an omission to execute and deliver the assignment, and to file the bond, within the times specified, will not render the assignment inoperative and void.

If an assignment is valid when made, and vests the title in the assignee, neither the omission of the assignor to deliver an inventory, nor any omission of duty by the assignee in the execution of the trust, will reach back and render the assignment invalid.

THIS action was brought to recover the value of certain personal property alleged to have been wrongfully taken and converted by the defendants. The defendants justified the taking, as sheriff and deputy sheriff, under an execution issued upon a judgment in favor of James Freeland and others against Stoddard S. Nichols. Nichols was in possession of the goods, and the owner thereof, until the 21st day of May, 1860. He made an assignment of all his property, including the goods in dispute, bearing date that day, for the benefit of his creditors, to Lewis Juliand. The assignment was acknowledged the day of its date, and was recorded in the office of the clerk of Chenango county on the 22d day of May aforesaid. The county judge of Chenango county did not fix the amount of the penalty of the assignee's bond until the 21st day of July, 1860. The bond which the assignee gave, was dated the 23d day of July aforesaid, and was approved by the county judge and filed the same day. The inventories of the assigned property were verified the 23d day of July, 1860, and were filed in the office of the clerk of Chenango county, with said bond, on the 24th day of that month. The inventories were not presented to the county judge until that day; and he fixed the amount of the penalty of the assignee's bond by affidavit without an inventory.

The plaintiff purchased the goods of said assignee and

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paid him \$1800 for them, and took possession of the same on the 20th day of July, 1860; and he took a bill of sale of the goods, dated that day. Nichols also gave the plaintiff a bill of sale of the goods, bearing the same date, which stated that it was given "for a valuable consideration." The assignee gave the plaintiff another bill of sale of the goods dated the 23d day of July, 1860, like the first except its date.

The judgment in favor of Freeland and others against Nichols was entered and docketed in the Chenango county clerk's office the 20th day of July, 1860, and the execution issued thereon, by virtue of which the defendants seized the goods, was received by the sheriff the 21st day of that month.

The action was tried at the Chenango circuit in September, 1861. The plaintiff insisted that he showed a perfect title to the goods, and was entitled to recover; and the defendants moved for a nonsuit, and then claimed and subsequently claimed on the trial that the assignment was void for several reasons. The judge directed the jury to find a verdict in favor of the plaintiff for the value of the goods, with interest thereon; and the jury rendered a verdict in his favor for \$1942.45. The defendants took exceptions, on the trial, which were settled, and directed by the judge to be heard in the first instance at the general term, and judgment was suspended.

S. S. Merritt, and A. Johnson, for the plaintiff.

R. McDonald, Rexford & Kingsley, for the defendants.

BALCOM, P. J. The assignment by Nichols to Lewis Juliaud was executed, acknowledged, delivered and recorded as required by chapter 348 of the laws of 1860. (*Laws of 1860, p. 594.*)

The defendants' counsel insists that the assignment became inoperative and fraudulent as against the creditors of the assignor, because the assignor did not within twenty days

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after the date of the assignment, make and deliver to the county judge of Chenango county, in which county the assignor resided, an inventory or schedule, as required by section two of the act of 1860 ; and because the assignee did not within thirty days after the date of the assignment, and before he first sold the goods in question to the plaintiff, give a bond according to section three of such act.

The well known fact that assignments have very frequently been made for the benefit of the assignors instead of their creditors, and to cheat and defraud the latter, satisfies me the authors of the act of 1860 intended that no assignment should be valid, unless the assignor and assignee complied with all the provisions of that act. But I am constrained to say that, by the well settled rules of construing statutes, that act does not make an assignment inoperative, or fraudulent, or void, if the assignor fails to make the inventory or schedule within the time required by section two of such act ; or if the assignee fails to give a bond within the time prescribed by section three of such act ; because the failure to do those things within the prescribed time is not declared in such act, or by any other legislative act, to have that effect ; and assignments were good by the common law, without any inventory, schedule or bond. (*See Evans v. Chapin*, 12 *Abbott*, 161 ; *MS. opinion of Justice Clerke, in Fairchild, receiver, v. Gwynne, assignee, &c. and others, N. Y. Transcript, Feb. 15, 1862.*)

When the assignment was executed, acknowledged, delivered and recorded, and the assignee took possession of the goods, the title to them became vested in him if the assignment was not fraudulent ; and he did not lose such title by failing to comply, or by the failure of the assignor to comply with the directory provisions of the act of 1860. Those provisions which require an inventory or schedule to be made within a certain time by the assignor, and a bond to be given within a certain time by the assignee, are merely directory, for the reasons already given ; and I will add that similar

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provisions in the legislative acts of Missouri and Pennsylvania have been held to be directory by the courts of those states. (*See Hardcastle et al. v. Fisher et al.*, 24 *Missouri Rep.*, 70; *Dallam v. Fitler*, 6 *Watts & Serg.* 323.)

The assignor, as well as the assignee, executed a bill of sale of the goods in dispute, to the plaintiff, on the 20th day of July, 1860; and the assignee executed another bill of sale of the same goods to the plaintiff after the inventory or schedule was made and filed and the proper bond was given, approved and filed, and before the defendants levied upon the goods. Nine hundred dollars of the consideration for the goods was paid in money by the plaintiff at the time he purchased them of the assignee; and the evidence shows the plaintiff was a purchaser in good faith, so as to enable him to hold the goods, as against the execution, before any levy was made by the defendants. (*See 11 Paige*, 21; 5 *Denio*, 619.)

I am of the opinion the assignment is valid on its face. (*See 34 Barb.*, 422; 33 *id.* 425; *Ogden v. Peters*, 21 *N. Y. Rep.* 23; *Griffin v. Marquardt*, *Id.* 121.)

I think there was no question of fact for the jury, except to determine the value of the goods; and that no error was committed on the trial to the prejudice of the defendants.

For these reasons I am of the opinion the defendant's motion for a new trial should be denied, with costs.

MASON J. The first question to be considered in this case is whether the omission of the assignee to file the bond required by the third section of the act of April 13th, 1860, and the omission of the assignor to make and deliver the inventory required by the second section, renders the assignment void. (*Laws 1860, chap. 348, §§ 2, 3.*) I do not think it does. If the assignment was valid when made, and vested the title in the assignee, no omission of duty by the assignee in the execution of the trust, can reach back and render the assignment invalid. Neither can the omission to make out

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and deliver the inventory, required by the second section of the said act, render the assignment invalid. The making of the inventory required by this statute may be after the execution and delivery of the assignment; and the making of it is a duty imposed on the assignor, over whom the assignee has no control. In the case of *Evans v. Chapin*, (12 *Abbott's Pr. R.* 161,) it was held that the omission to make and deliver the inventory did not affect the validity of the assignment, and that the statute, in that particular, was merely directory. (*How. Pr. R.* 289. 2 *Paige*, 311)

This statute must be held to be merely directory, both upon principle and authority. (4 *Seld.* 13, 328. 34 *Barb.* 620, 627. 6 *Wend.* 486. 16 *John.* 135. 19 *Wend.* 143. 14 *Barb.* 298 to 294. 12 *Wend.* 481. 6 *Hill*, 42. 2 *id.* 329; 23 *Barb.* 313. 26 *id.* 586. 17 *N. Y. Rep.* 445. 18 *id.* 220. 10 *Wend.* 663. 3 *Hill*, 43. 3 *Mass. R.* 230. 11 *Wend.* 604; 7 *Hill*, 9.) These things were done, but not within the time directed by the statute. The statute makes it the duty of the assignor to make out and deliver the inventory to the county judge within thirty days, and also makes it the duty of the assignee to execute the bond required by the third section within thirty days; but there is no negative in the statute declaring it shall not be done after that time; and the statute is entirely silent as to the effect of the omission to do either.

It seems to me very clear, therefore, within the principle of the cases above referred to, that this statute must be regarded as directory as to the time, at least, in which these acts must be done. The title vested in the assignee at the time of the assignment, and by virtue of it the assignee is authorized to take possession of the property at once, without any reference to his having executed his bond. It is true the third section of the act requires that the bond shall be executed before he shall have power or authority to sell or convert the assigned property to the purposes of the trust. The omission of the assignee to give the bond may be

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treated as a refusal to serve, perhaps, and justify an application to appoint a receiver. (*Burrill on Assignments*, 573, 3d ed.) or may furnish good cause for so doing. (5 *Seld.* 176. 2 *Barb. S. C. R.* 446. 5 *Paige*, 46. 8 *id.* 294. 2 *Story's Eq.* 1289. *Burrill on Assignments*, 507, 568, 2d ed.)

The construction of this statute contended for by the defendant cannot upon any known principle prevail. It cannot be that the assignee takes only the conditional title, subject to be deprived of it if the inventory is not delivered in twenty days, or the bond executed in thirty. The property is not thus held in suspense. This statute contains no such provision and has no such effect; and previous to the statute the law was well settled that on delivery of the assignment the title passed, and the rights of the creditors under it became vested and fixed, and could not afterwards be impaired by any act or omission of duty by the assignee. (4 *John. Ch.* 135. 1 *Duer*, 58. 20 *N. Y. Rep.* 15. 5 *Seld.* 142, 152. *Burrill on Assignments*, 304, 306, 308, 309.) If valid in its creation no subsequent illegal acts of the assignor or assignee could in any manner invalidate it. (6 *Barb.* 91, 94. 33 *id.* 127, 135. 24 *id.* 105. 32 *id.* 126. *Burrill on Assign.* 442, 3d ed.) This assignment is not void by reason of any thing appearing on the face of the assignment. It is a fundamental rule in the construction of written instruments susceptible of two meanings, one of which would render the instrument lawful, and the other unlawful, that the courts shall give it that construction which will render it lawful and uphold the instrument. (15 *Barb.* 61. 10 *How. Pr. R.* 175, 178. 19 *Barb.* 176. 22 *id.* 550, 561. 1 *Kernan*, 305. 17 *Barb.* 392. *Burrill on Assign.* 374.) Applying this rule of construction to the portions of this assignment which are made the subject of criticism on this appeal, the defendant's objection to this assignment cannot prevail. If, however, this assignment is to be regarded as fraudulent, as to the creditors of the

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assignor, I do not see how it could prejudice the plaintiff's case, as he must, upon the evidence in the case, be regarded as a bona fide purchaser from the assignee, before these defendants had made their levy upon the property; and in such a case an innocent purchaser, for a valuable consideration, acquires a good title, even from a fraudulent assignee. (9 *Paige*, 132. 18 *John*, 515. 3 *Duer*, 183. 17 *N. Y. Rep.* 9, 21. 6 *Abbott*, 357, 374. 1 *Barb. Ch.* 220, 240, 241. 21 *Barb.* 469. *Burrill on Assign.* 509, 510, 2d ed. 1 *Story's Eq. Jur.* § 381. 4 *Kent's Com.* 464, note. 2 *R. S.* 137, § 5.)

It is not necessary to inquire as to the validity of the bill of sale executed before the assignee had executed his bond; for he executed to the plaintiff a second bill of sale after he had executed his bond, and before the levy. There was no question for the jury in the case. There was no evidence of fraud in this assignment, and nothing from which such a verdict could be justified. And in such a case the court may direct a verdict when a contrary finding would be set aside as against evidence. (6 *Bosw.* 148. 14 *Barb.* 303. 4 *Seld.* 73 to 79.) The plaintiff was shown to be a bona fide purchaser; and as the defendant did not raise any question as to the good faith of the plaintiff's purchase, this question must be regarded as concluded on the trial, and consequently the question whether this assignment was fraudulent or not became wholly immaterial, and it could not affect the plaintiff's title as a bona fide purchaser.

It follows that the defendants were trespassers in taking this property, and the judge at the circuit was right in directing a verdict for the plaintiff. A new trial must be denied.

CAMPBELL and PARKER, Justices, concurred.

Motion for new trial denied.

[BROOME GENERAL TERM, July 8, 1862. *Balcom, Campbell, Parker and Mason*, Justices.]

RANSOM and WHITE *vs.* WETMORE.

Where, in an action for a *tort* in wrongfully taking and converting the plaintiff's property, there is an entire failure of proof that the taking was wrongful or tortious, or that there was any fraudulent intent, the plaintiff should be nonsuited. He cannot, at the close of the case, waive the *tort* and recover as upon a *contract*.

An amendment which will change the form and nature of the action from *tort* to *assumpsit* cannot be asked for after the whole case is finished.

A defendant is not obliged, in that stage of the case, to assent to so important and material a change, or by failing to do so, to waive his rights already acquired by a motion for a nonsuit. His refusal to assent to such an amendment cannot be regarded as in any way affecting the question presented on the motion for a nonsuit.

THIS action was commenced in a justice's court, before Erastus T. Peck, Esq. a justice of the peace of Durham in the county of Greene, by the appellants, to recover against the respondent, for the alleged wrongful taking and conversion of fifteen sheep. The defendant denied the complaint, and also set up as special matter that he was the owner of the sheep; that they were in the plaintiffs' flock; that the plaintiffs consented and allowed the defendant to sort and pick them out, and that thereupon he took the same and drove them away, &c. The trial of the cause was commenced before said justice and a jury, January 30, 1860, and a verdict was rendered for the plaintiffs, for \$24 damages, February 1, 1860, on which judgment was rendered by the justice. The defendant appealed to the Greene county court, where the judgment was reversed, and judgment entered for the defendant for costs; and the plaintiffs appealed to this court.

On the trial before the justice, after the plaintiffs had rested, the defendant's counsel moved for a nonsuit and a dismissal of the proceedings, on the following grounds:

"1. That the plaintiffs have not made out a cause of action against the defendant. 2. That the plaintiffs have failed to prove sufficient to substantiate their complaint. 3. That the action is brought to recover the value of fifteen sheep which

39	104
63h	402
39	104
42	185
52	578
53	571
1h	84
1h	207
5a	102

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the plaintiffs claim the defendant wrongfully took and converted to his own use; that there is no proof that the defendant ever converted said sheep to his own use; and if he did, and the proof establishes that fact, then it was done by the permission of the plaintiffs or one of them; that the proof shows that the sheep in question were taken by the defendant by and through the permission of one of the plaintiffs; that the only action the plaintiffs have against the defendant, if any, is for the value of the sheep in an action on contract, and should have been brought in an action of assumpsit, and not for a wrongful taking and converting—there being no demand for the property by the plaintiffs of the defendant proved; and the proof shows that the property or sheep were taken by the permission of the plaintiffs or one of them. The motion was resisted by the plaintiffs, who demanded the cause to be submitted to the jury. The motion for a nonsuit was denied, and the defendant's counsel excepted.

At the close of the testimony the plaintiffs' counsel moved to amend the complaint, so as to change the action from *tort* to *assumpsit*, which was objected to by the defendant's counsel, and the motion was denied.

The defendant also, before the county judge, alleged error in fact of improper conduct by the plaintiffs to influence the jury, and affidavits were read and used on both sides on the argument. The county judge, however, reversed the judgment, and the plaintiffs appealed to the supreme court.

A. M. Osborne, for the plaintiffs and appellants.

D. K. Olney, for the defendant and respondent.

By the Court, MILLER, J. I think the justice erred in denying the motion for a nonsuit. The action sounded in tort, and was for the wrongful taking and conversion of the plaintiffs' sheep by the defendant. It appeared upon the trial, from the uncontradicted evidence in the case, that the

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defendant, claiming to have lost some of his sheep, called upon the plaintiffs and with their assent examined their flock for the purpose of ascertaining whether the defendant's sheep were among them. The defendant, with the consent and permission of the plaintiffs, took the sheep which he supposed to be his. He promised to make it right if they turned out not to be his sheep, and the plaintiffs told him if their sheep fell short he must make it right. Neither party appeared to be very confident as to the ownership of some of the sheep, and they were taken and surrendered under the impression of both that they belonged to the defendant. One of the plaintiffs afterwards called upon the defendant to pay for the sheep, which the plaintiffs afterwards claimed belonged to them. So far then as the original taking is concerned, there is an entire failure to show that it was wrongful or tortious. Nor do I think that there was any evidence that there was fraud and deception practiced by the defendant in obtaining the sheep. I have examined the testimony bearing on this point with some care, and it appears to me that it is too remote and uncertain to establish any such hypothesis. It does not show or tend to show that the defendant knew at the time he received the sheep that they were not his, and that he took them with knowledge that they were not. There is no evidence of a fraudulent intent on his part. The plaintiffs at the close of the case waived the tort and abandoned all claim to recover on that ground, and thus conceded that there was no fraud. As the case stood, the justice should have nonsuited the plaintiffs, and the action could not be maintained, within the principle laid down in several adjudicated cases. (*Walter v. Bennett*, 16 N. Y. Rep. 250. *The Mayor &c. v. The Parker Vein Steam Ship Co.*, 21 How. Pr. Rep. 289. *Texier v. Gouin*, 5 Duer, 389.)

It is insisted, however, by the plaintiffs, that the plaintiffs having, after the testimony was closed, asked leave to amend and change the form of the action to one of assumpsit, and the defendant having objected to it and the justice sustained

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the objection, the defendant was not prejudiced, and he thereby waived all advantage he was entitled to by reason of his motion for a nonsuit and the refusal of the justice to grant it. It is perhaps questionable whether the justice erred in refusing to allow the amendment proposed. (*See 16 N. Y. Rep. 250, and 5 Duer, 389, before cited.*) But whether he did commit an error or not is not a subject of review in this case. The proposed amendment would have entirely changed the form and nature of the action from tort to assumpsit. It was asked after the whole case was finished, and the defendant had been compelled to litigate an entirely different cause of action. Had it been asked when the motion for a nonsuit was made, upon the ground of variance, it would have materially altered the case, and the defendant could have been prepared to some extent to meet this entire change of the plaintiffs' claim. Even if the variance was of such a nature as to be amendable, I know of no rule of law which would compel the defendant in that stage of the case to assent to this important and material change, or by failing to do so to waive his rights already acquired by his motion for a nonsuit. The effect of the amendment would be to compel the defendant to try the whole case over again, and I think his refusal to assent to it cannot be regarded as in any way affecting the question presented on the motion for a nonsuit.

The conclusion to which I have arrived upon the points already discussed renders it unnecessary to examine the other question raised by the defendant.

The judgment of the county court should be affirmed with costs.

[ALBANY GENERAL TERM, December 1, 1862. *Hogeboom, Peckhan and Miller, Justices.*]

SANDS, receiver &c., *vs.* KIMBARK and others, executors &c.

The act of the legislature, of April 21, 1862, "to facilitate the closing up of insolvent and dissolved mutual insurance companies," is not unconstitutional and void, as impairing the right of trial by jury.

THIS proceeding was under the act entitled "An act to facilitate the closing up of insolvent and dissolved mutual insurance companies," passed April 21, 1862.

David Kimbark, the testator, on the 1st of April, 1851, made his note to the *Ætna Insurance Company of Utica*, for \$360, payable at such time or times as the directors of said company might require, agreeably to their charter and by-laws. The company was both insolvent and dissolved. The plaintiff, its receiver, assessed the note to its full amount, to pay the liabilities of said company, and caused a personal demand of payment to be made of the maker's executors, who neglected payment, when the same was referred to Solomon Bundy, Esq. sole referee, upon application to Hon. William W. Campbell, a justice of this court residing in the district where the plaintiff, as receiver, keeps his office. As provided by the 2d section of the act, the referee proceeded in a summary manner to hear the proofs and allegations of the parties, upon written pleadings. Before answer and proceeding in the trial, the defendant objected to any proceedings being had therein, claiming that the act under and by virtue of which the referee was appointed was unconstitutional and void. The plaintiff proved that an assessment was made by him on the 14th June, 1862, by which the said note, being a note in the merchants' department, was assessed to its entire amount; that the 9th of August, 1862, was fixed for its payment; and that the notice of assessment was published as required by the charter and by-laws. The plaintiff further proved that the note was given for a policy of insurance for three years from its date, and that the losses for which said assessment was made amount to \$33,792.59, and that said losses accrued whilst the policy was in force; that said losses were in the

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same department of the testator's note and policy ; and that all the notes of that department were insufficient to pay the losses of that department. The defendants admitted the note to have been executed by their testator as a premium note and not as a stock note ; that a personal demand of payment was made ; and that payment was neglected and refused before the commencement of this proceeding.

When the plaintiff rested the defendants moved for a non-suit, on the grounds :

First. That the act under which the reference is had is unconstitutional and void, as impairing the right of trial by jury.

Second. That the claim in action is barred by the statute of limitations.

Third. That the assessments of the plaintiff are void as to the defendants, (1.) For the reason that the affidavit on which it is based shows no loss for which the testator's note is liable to contribute. (2.) That there is no proof any where of such losses. (3.) That the assessment is general, assessing all the notes of its class, and of all dates, to their full amount. (4.) That there is no legal proof of the occurrence of any losses for which any assessment could be made, nor for which the said note is liable to contribute. The referee decided,

First. That the act under which the reference is ordered is a valid act.

Second. That the statute of limitations forms no defense to this action, the note in action being a premium note.

Third. That the receiver's assessment of June 14th, 1862, being proved to be for losses which accrued in the merchants' department whilst the testator's note and policy in that department were in force, is a valid assessment.

Fourth. That the plaintiff is entitled to judgment for three hundred and sixty dollars, being the entire amount of said note with interest from September 13th, 1862, being the date of the demand of payment of said note, and of the neglect and refusal to pay the same.

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The defendants excepted to each of said decisions.

The charter provided "that the notes be paid in whole or in part, and at such times as the directors shall deem the same requisite for the payment of losses and such incidental expenses as shall be necessary for transacting the business of the company." It further provided that "the company may in their discretion divide applications into two or more classes, according to the degree of hazard, and the premium notes shall not be assessed for the payment of any losses except in the class to which they belong."

The by-laws provided "that the directors may make such assessments upon the premium notes as they may think necessary."

The defendants appealed to the general term.

Horace Packer, for the appellants. I. The act of April 21, 1862, ch. 412, is unconstitutional and void. (*Const. art. 1, sec. 2.*) It takes away the right of trial by jury, in cases wherein it before existed. It has instituted a new court, which proceeds not according to the common law. (*Art. 1, sec. 17.*) These rights have always been guarded with great care by all judges and jurists. (3 *Bl. Com.* 380. 3 *Hamilton's Works*, 259, No. 83. 3 *Dallas*, 388.) The right of trial by jury applies to civil as well as criminal actions. (10 *Wend.* 449.) The tribunal below is nowhere provided for in the constitution. That instrument is clear as well as minute in this regard—too much so for any thing herein to the contrary to be taken by implication. The power of the legislature to create inferior courts is confined to *cities*. (*Art. 6, sec. 14.*) If a court of record, its proceedings, rules of practice, &c. should have been reported to the legislature by the commissioners of the code. (*Art. 6, sec. 24.*) The act is summary and arbitrary in its proceedings, such as were unknown in any of the courts. It takes away the defendant's day to plead. It deprives him of the right to apply for discovery on oath, that he may plead and defend understand-

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ingly. Its proceedings are not according to the rules of law, nor the rules and practice in equity. The act under which the corporation was created, provided a remedy *in law* for all controversies that might arise in said company. The company ceased to exist about the time the defendants' testator's policy expired; and the rights of all parties became fixed by the laws as they then were. It is a *live* corporation whose charter may be altered. The courts never went further than to allow a reference in cases only where an issue of fact had been joined, or in interlocutory proceedings. (*Lee v. Tillotson*, 24 *Wend.* 337.)

II. The alleged cause of action did not accrue to the plaintiff within six (7) years next before its commencement; nor was the action commenced within one year next after the appointing of executors of deceased. At the expiration of his policy the said David Kimbark ceased to be a member of the company; and not having been a party, nor had any knowledge of the proceedings had by said company, he was not, nor are the defendants, bound by such proceedings, nor can his estate be prejudiced thereby. The first assessment was 21st March, 1855. At that time the note became payable. If the creditors have slept upon their rights, or been remiss, the rules of law should not be warped to save their lost rights.

III. The assessment of the 14th June, 1862, is unauthorized and illegal. The note was outlawed before the time of said assessment. There is no proof, as required, of losses. There was no proof at the time of any valid and subsisting claims against the company. The receiver is not liable over to the alleged creditors.

IV. If the act of April 17, 1854, chapter 369, has the force to bring the company in question under that act, and subject it, with other insolvent corporations, under the general statutes, as claimed by the plaintiff, then the note in question should be abated so that it will be but five times the amount of the cash premium, to wit, \$90. The other exceptions and objections taken and contained in the case and bill of excep-

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tions, are not waived nor abandoned by the defendants, but are held to be good, and well taken.

Henry R. Mygatt, for the respondents. I. The act entitled "An act to facilitate the closing up of insolvent and dissolved mutual insurance companies," passed April 21, 1862, (*Laws of 1862*, p. 743,) is not unconstitutional.

(1.) Before the court will deem it their duty to declare an act of the legislature unconstitutional, a case must be presented in which there can be no rational doubt. (*Ex parte McCollum*, 1 *Cowen*, 450. *People v. Huntington*, 4 *N. Y. Leg. Obs.* 187. *Clarke v. City of Rochester*, 24 *Barb.* 446.)

(2.) It is not in conflict with section 2 of article 1 of the constitution of this state, which declares that "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." (*Const. of 1777*, § 41. *Same provision of Const. of 1822*, art. 7, § 2. *Same provision Const. of 1846*, art. 1, § 2.) That section gives a right of trial by jury only in cases where it had been *theretofore* used. The word heretofore in this clause in the constitution of 1846, means before 1846, and cannot, to limit its meaning, be carried back to and confined to the cases which at that earlier period were triable by jury. (*Wynehamer v. People*, 13 *N. Y. Rep.* 378, 427, 458.) Denio, J. in delivering the opinion of the court says: "In controversies cognizable in courts of equity, a jury trial was never in general resorted to. The facts were determined by the court, or its officers, or by referees. Particular issues might be ordered for trial by a jury, but this was discretionary except in a few cases where there were particular statutory provisions. *The winding up and settling of the affairs of insolvent corporations fell within the jurisdiction of courts of equity from the nature of the case.* (*Matter of the Empire City Bank*, 18 *N. Y. Rep.* 199, 210.) The Supreme Court in New York, by Mitchell, J.: "It is objected that a corporation can be dissolved only by *quo warranto* or an action

under the code of like effect. *The legislature may alter the form of remedies as it pleases. The provisions of the constitution as to trial by jury, do not apply, as this is a proceeding on account of insolvency, which has been generally prosecuted in a summary way or before the court of chancery.* (Case of the Mechanics' Fire Ins. Co. 5 Abbott's Pr. 444.)

(3.) Proceedings of the like nature to the act in question, were the laws of the land prior to the constitution of 1822, as well as under the revised statutes of 1830, and so continue until this time. *Edwards on Referees*, page 1, in regard to the constitutionality of references, says: "It has been made a point that a reference is unconstitutional from the fact that a party has a right to a trial by jury; but previous to the adoption of the state constitution, references were known and sanctioned."

By the revised laws of 1813 "all matters and accounts between such absconding and concealed debtor and his debtors or creditors," his trustees were authorized to settle. (1 R. L. 1813, p. 161, § 15.) And referees were nominated and appointed for that purpose. (*Id.* 161, § 16.) The supreme court in 1840, by Cowen, J. said: "But the seventh article (§ 2) of our own constitution declares that, 'the trial by jury in all cases in which it has been heretofore used shall remain inviolate for ever,' and the case before us is supposed not to come within the exception. It is a satisfactory answer, however, that references as broad as that now contended for by the plaintiff were sanctioned by statute, and practiced by the courts long before the adoption of the constitution." (*Lee v. Tillotson*, 24 Wend. 337.)

(4.) The reference of claims due insurance companies is authorized in the same manner and by the same statute, as the reference of all claims due to or from any bank or other insolvent corporations. *First.* The term moneyed corporations applies the same to insurance companies as to banks. "The term 'moneyed corporation,' as used in this title,

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shall be construed to mean every corporation having banking powers, or authorized by law to make insurances." (1 *R. S.* 599, § 51. 2 *id.* 5th ed. 526, § 54.) *Second.* Equity proceedings against insurance companies are the same as against banks. The statute declares that, "whenever any corporation having banking powers or *authorized by law to make insurances*, shall become insolvent," the same shall be restrained from exercising any of its corporate rights, privileges or franchises. (2 *R. S.* 464, § 39. 3 *id.* 5th ed. 764, § 47.) *Third.* The revised statutes declare that "such receivers," (referring to receivers of insolvent corporations,) "shall have the power to settle any controversy that shall arise between them and any *debtors or creditors* of such corporations *by a reference*, as is by law given to the *trustees of insolvent debtors*." (2 *R. S.* 470, § 80. 3 *id.* 5th ed. 770, § 54.) And the same proceedings for that purpose shall be had, and with the like effect. (*Id.*) *Fourth.* "If any controversy shall arise between the trustees [of an insolvent debtor] and any other person, in the settlement of any demands against such debtor or of debts due to his estate, the same may be referred to three indifferent persons" to be agreed upon. (2 *R. S.* 45, § 19. 3 *id.* 5th ed. 118, § 21.) If said referees are not selected by agreement then they are to be appointed on ten days' notice to the officer making the appointment of said trustees. (2. *R. S.* 45, § 20. 3 *id.* 5th ed. 118, § 22.) *Fifth.* By the act in question the reference is retained and the sole referee is adopted. The act assimilates to the sections of the act directing compulsory references in controversies with the trustees of insolvent debtors.

II. The statute of limitations has no application to this note, the payment of which was not demanded until the day of the commencement of this proceeding.

III. The assessment is valid. It is upon a note in the merchants' department, to pay the losses of that department only ; the losses during the existence of the appellant's note

and the policy accompanying the same, were more than the valid notes of that department during that term.

IV. It is no objection to the respondent's recovery that the appellant's testator's note was given for more than five times the amount of the premium paid in cash. The restraining act was of June 25, 1853, and this note was long before that date.

By the Court, CAMPBELL, J. This action was brought against the defendants as executors, by the plaintiff, as receiver of a mutual insurance company, and was referred to a referee, pursuant to the act of April 21st, 1862, passed to "facilitate the closing up of insolvent and dissolved mutual insurance companies." On the hearing before the referee, the defendants objected that the act under which the reference was ordered was unconstitutional and void, as impairing or taking away the right of trial by jury. The referee decided that the act was valid and constitutional, and this raises the important question in this case.

A quaint old writer in an article entitled "a guide to juries," printed in the "Conductor Generalis," published in the city of New York in 1749, after remarking among other things that that "is the best law which leaves the least to the arbitrariness of a judge," and that "judges represent the king's person; they are his officers and act in his stead," concludes, (citing Bracton, 119,) "they ought not at all be concerned in causes of life or member, &c. where the king is a party, for says he, "the king is thus judge as it were in his own cause." And he further remarks, "thus appears what is the difference of judges and juries and something of the reason why the parliament has all along been so zealous for trials by juries, as no fewer than *fifty-eight* several times since the *Norman* conquest hath established and confirmed the trial by juries, no one privilege else, nigh so often remembered in parliament."

This work, as I have stated, was published in New York

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in 1749, though it had been written in England. It was adapted to the practice in New York, especially in proceedings before justices and courts of sessions, and the article on juries had a peculiar significance at that period. There had been noted instances where an independent jury had stood between the court and the prisoner. A short time previous had occurred a memorable trial, that of Zenger, during the administration of Gov. Cosby, when by an arbitrary order the counsel of the prisoner was thrown over the bar, and all the power of the court and the government was brought to bear to insure a conviction. The jury however, in defiance of power, acquitted the prisoner. So at a still earlier day, during the reign of Queen Ann, where a dissenting minister was indicted for preaching without the queen's license, an independent jury, in opposition to the charge of the court, returned a verdict of not guilty. There were also violent conflicts between several of the royal governors and the people of the colony of New York in reference to the establishment of a court of chancery. It continued with more or less severity for nearly a century, and its complete history would form an interesting chapter in the annals of our colonial jurisprudence. The objection to the court was mainly however founded in political considerations. For a considerable portion of the time, the governor and council formed the court of chancery. Towards the close of our colonial existence the governor alone was chancellor. That court at times exercised powers at least very questionable. Thus, during governor Hunter's administration, he writes to the lords of trade, in 1712, that for some years no quit-rents had been paid, and that by advice of the chief justice and others, learned in the law, he had issued writs out of the court of chancery for the purpose of enforcing collection, and he adds, "it appeared a combination by their own confession, several having owned that they were resolved never more to pay any, relying upon the sense and strength of a county jury, if they should at any time be sued for the same." In 1717, the same governor

wrote to the lords of trade as follows: that soon after his arrival "the receiver general complained that there was a total cessation of payment of quit-rents, and begged for a remedy, he hoped for none in the common course of law, the delinquents not only trusting to, but bragging of the impossibility of finding juries in the country that would give a verdict for the crown, if left to a jury, upon which the delinquents were subpoenaed to the court of chancery, *which immediately had its effect.*"

Though the governor still continued as chancellor, the court of chancery at the close of our colonial existence had become firmly established. Thus Governor Tryon, the last of the royal governors, in June, 1774, thus refers to it: "The province has a court of chancery in which the governor or commander-in-chief sits as chancellor, and the practice of the court of chancery of England is pursued as closely as possible. The officers of this court consist of a master of the rolls, newly created, two masters, two clerks in court, a register, an examiner, and a sergeant at arms." Thus it will be seen that the court, with the exception of a master of the rolls, had the same general organization before as after the revolution, and which with but unimportant changes remained down to the time of the adoption of the constitution of 1846. The same was true of the supreme court and the old court of common pleas, especially as to the former, down to 1821.

The supreme court, in colonial times, claimed to exercise and was admitted to possess all the powers of the English courts of king's bench, exchequer and common pleas. From this glance at the courts before the revolution, we may perhaps be in some degree better enabled to understand that provision in the constitution of 1777, relating to the trial by jury. That constitution it is understood was almost if not entirely the production of the pen of John Jay. Though other able lawyers and illustrious statesmen were also members of the convention. The 41st section is as follows: "And this convention doth further ordain, determine and declare, in

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the name and by the authority of the good people of this state, *that trial by jury in all cases in which it hath heretofore been used in the colony of New-York*, shall be established and remain inviolate forever, and that no acts of attainder shall be passed by the legislature of this state for crimes other than those committed before the termination of the present war, and that such acts shall not work corruption of blood; and further that the legislature of this state shall at no time hereafter institute any new court or courts but such as shall proceed according to the *course of the common law.*"

The constitution of 1777 was not submitted to the people for ratification. The convention was clothed with full powers to make the constitution, and so far as I am aware, no record was preserved of the debates, if any, which were had at the time of its adoption by the convention. But though the language of the section is broad enough to cover trials both in civil and criminal cases, yet from the context I am strongly inclined to think that the framers of that constitution had special reference to trials by jury in criminal matters. No acts of attainder were to be passed and no new courts established, which should not proceed according to the course of the common law—that is, no star chamber court or court of that character and form of proceeding. The court of chancery, a court which did not in all things proceed according to the course of the common law, but which in some of its forms and maxims followed the civil law, was preserved by this same constitution in full force and vigor. The royal governor was no longer to be chancellor, but this judicial officer was to be appointed from among the people by the governor whom the people should elect. The great object undoubtedly was to preserve to the citizen of the new state, what may have been his right and his boast when an English subject. "The trial by jury in criminal cases is more peculiarly the grand bulwark of the liberties of every subject, and is secured as has already been mentioned, by the great charter, 9 Henry 3." (*Jacob's Law Dict. tit. Jury.*) The language of the section

of the great charter referred to is, "No freeman shall be taken or imprisoned or be disseized of his freedom or liberties or free customs, or be outlawed or exiled or any otherwise destroyed, nor we will *not pass upon him nor condemn him but by lawful judgment of his peers*, or by the law of the land." This becomes more obvious when we see with what unswerving fidelity on the part of all branches of the government, and especially by the judiciary, the right to trial by jury in criminal cases has been maintained, even holding that the prisoner could not by consent, as in Cancemi's case, be convicted by less than twelve men. On the other hand, there has been frittering away by legislatures and courts in civil cases, limiting the application of the constitutional inhibition in civil cases to proceedings where an issue was formed, and holding as valid and constitutional enactments under which by assessments and appraisals of commissioners and others, the property of individuals was taken for the use of the state or for corporations. In the convention of 1821, many members doubted whether it was wise to incorporate in the constitution what might properly be termed a bill of rights. So far as the civil administration of justice is concerned, there can hardly, I think, be a doubt that it is safe enough to leave it to be regulated by the legislature.

But assuming that the provisions in the constitutions of 1777 and 1821, have reference to trials in civil as well as in criminal cases, and which I admit is the fair construction of the terms, and has received the sanction of our courts; admitting this, does the case before us fall within the exceptions which have been recognized; in other words, is it not a proceeding or trial as "heretofore used," without a jury? Does it properly fall, as claimed by the counsel for the plaintiff, within the equitable jurisdiction of the supreme court exercising the powers of a court of chancery? Dissolving copartnerships and moneyed and other corporations, whether banks or insurance or manufacturing companies, appointing receivers, and regulating the collection and distribution of their

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assets, is a well regulated branch of equity jurisdiction. It belongs to a class of cases coming under the head of implied trusts.

“A court of common law,” says Mr. Justice Story, in his *Equity Jurisprudence*, § 1252, “is incapable of administering any just relief, since it has no power of bringing all the proper parties before the court, or of ascertaining the full amount of the debts, the mode of contribution, the number of contributors, or the cross equities and liabilities which may be absolutely required for a proper adjustment of the rights of all parties as well as the creditors.” And in the *Matter of the Empire City Bank*, (18 N. Y. Rep. 210,) Judge Denio states the doctrine clearly and concisely, that the winding up and settling the affairs of insolvent corporations from the very nature of the case, fell within the jurisdiction of a court of equity, and that it was the constant practice of a court of chancery, “to entertain suits for that purpose, and by its decree determine who were stockholders and contributors, and in what proportions they were to contribute, and to cause an account to be taken of the unsatisfied debts and liabilities, and to decree a distribution,” citing *Slee v. Bloom*, (19 John. 456,) and *Briggs v. Penniman*, (8 Cowen, 387.) The first of these cases grew out of the winding up of a manufacturing company, and a decree was made on the first hearing in the court of errors directly against a portion of the stockholders, for the payment of balances due upon their stock, or in proportion sufficient to pay the plaintiff’s debt, and as to other stockholders who claimed set-offs, the matter in controversy to be determined by a master in chancery. *Briggs v. Penniman* was also an action for dissolving a manufacturing corporation. The court of chancery decreed the corporation dissolved, and that the stockholders were liable for the debts to the extent of their respective shares, and referred it to a master to report the amount of debts and the proportions chargeable to the stockholders. This decree was affirmed in the court for the correction of errors, and in that court Spencer, senator, thus tersely states the doctrine which applies in

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this case. "The stock subscribed and agreed to be paid into the company became corporate property, and when paid in, might be reached by ordinary proceedings, and if not paid in, a court of equity would compel the trustees to collect and apply it to the payment of debts." (*Salmon v. The Hamborough Company*, 1 Cas. Ch. 204. 1 *Kyd on Corp.* 273.) The same principle was acted upon in the case of *Slee v. Bloom*, in which the stockholders were required in the first instance to pay up the amount of their subscriptions for the benefit of the creditors.

Now in the case of these mutual insurance companies, every person taking out an insurance and giving his note to the company, becomes a member liable to contribute under certain contingencies for the payment of debts, the whole amount of his note. His case is analogous to that of a stockholder in other corporations who had paid in a portion of his subscription, and was liable to be called upon to pay in the balance if the exigencies of the corporation should require it. In both cases the subject matter falls alike within the jurisdiction of a court of equity. In the one case, the stockholder may not be required to pay in the whole balance of his subscription, and the member of the mutual insurance company may be called on to pay an assessment less than the amount of his note. The doctrine of contribution is applicable in both cases, and I am unable to see why this receiver could not on the equity side of this court, representing as he does both the insolvent and the dissolved corporation and its creditors, have commenced an action making all the members whose notes remained unpaid, and who were liable to contribution, parties defendants. It might be and doubtless would be a very unwieldy action, but I apprehend it would not be contended by the defendants, that they were of right entitled to a trial by jury. I think the law well settled the other way, not only by the cases in our own courts, but by numerous decisions in other states, and in England; that is, that the whole matter falls within the jurisdiction of a court of equity.

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The law of 1862 does not, therefore, confer or attempt to confer any new equity jurisdiction. It does not seek to transfer a subject matter which was previously only cognizable in a common law court over to a court of equity, and thus deprive a party of a trial by jury. Its aim is to point out and authorize a new and more speedy and inexpensive mode of disposing of the controversies which may arise, between the receiver and the members of a company in relation to their liability to contribute, and the amount of such contribution where the liability is conceded or established. The subject matters remain as before, but a more expeditious remedy is given. The equities are to be worked out by a somewhat different process. There is no longer necessity for an unwieldy action embracing all the members as parties.

When the motion for appointing a referee was argued before me at special term, by the able and ingenious counsel for the members of this insolvent company of which the plaintiff is receiver, I had at first grave doubts as to the constitutionality of the law of 1862. But subsequent examination and reflection have satisfied me that my original impressions were erroneous. Other reasons than those given might be stated; especially the proceedings in cases of the insolvency of individuals, might be referred to, as showing compulsory references prior to the constitution of 1846. But for the reason that the whole subject matter of the dissolving these companies and appointing receivers, and collecting and distributing the proceeds and payment of debts, was formerly and is still within the jurisdiction of a court of equity, in which court the matters in controversy were generally settled without a jury, and that the law of 1862 confers no new jurisdiction, but only authorizes a more expeditious and less expensive remedy, I am of opinion that such law is not unconstitutional.

The other points in this case have been heretofore disposed of. The judgment must be affirmed with costs.

[BROOME GENERAL TERM, January 27, 1863. *Balcom, Campbell and Mason, Justices.*]

WAFFLE *vs.* DILLENBECK.

In an action for assault and battery, the judge charged the jury as to the effect of their verdict on the question of costs, in case they should find for the plaintiff, and refused to charge them that in arriving at the amount of the verdict they would give the plaintiff, they had nothing to do with the question of costs, or whether or not their verdict would entitle him to full costs. *Held* correct.

THIS was an action for assault and battery, tried at the Otsego circuit in December, 1861, before Justice CAMPBELL and a jury.

Defenses: 1st. A general denial; 2d. *Son assault demesne*; 3d. Defense of the defendant's close. The undisputed facts were that the lands of the parties joined; the defendant's lying easterly of the plaintiff's. Some twenty years ago the plaintiff's land lying next to the defendant's was woodland, and the plaintiff refused to build any portion of the division fence between him and the defendant for that reason. The defendant therefore built the fence in question from 7 to 20 feet on his own land, so that the rails and fence would belong to him. Some eight or nine years ago the road had been so altered that the fence was just west of it, and of no use to the defendant, he having only a strip from one to three rods wide, west of the west bounds of the road. Since the alteration the plaintiff, in cutting off his timber, had occasionally fallen a tree across it, and by putting in new rails in the place of those thus broken, had, as he claimed, thus repaired the fence. On the morning of the affray the parties had some conversation about the plaintiff's cattle getting on to the defendant's land, when the plaintiff claimed the fence was not good, and the defendant told him he had heard enough about the fence and would move it away. He and his sons and hired man commenced doing so, when the plaintiff took two of his men and a cane and went over where the defendant and his men were at work, and used abusive and insulting language to the defendant. The evidence was con-

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37h 566
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flicting as to whether the plaintiff first struck the defendant with the cane, or the defendant struck the plaintiff with his fist. The court charged the jury as to the rules of law by which they should be governed in determining whether their verdict should be for the plaintiff or for the defendant; and that if their verdict should be for the plaintiff, the amount of it was purely a question for their determination. The court further charged the jury that "a verdict for the plaintiff for less than \$50 damages would not authorize the plaintiff to recover full costs; that a verdict for less than \$50 damages would not entitle the plaintiff to recover against the defendant any more costs than damages; and a verdict for the plaintiff for \$50 or more would entitle the plaintiff to recover all the legal costs and disbursements of prosecuting the action."

The defendant's counsel excepted to this portion of the charge as a whole, and also specifically to each proposition of it. The defendant's counsel requested the court to charge the jury "That in case they should find for the plaintiff, in arriving at the amount of the verdict they would give him, they had nothing to do with the question of costs, or whether or not their verdict would entitle him to full costs." The court declined so to do, and the defendant's counsel excepted. The jury rendered a verdict for the plaintiff for \$50, and after judgment the defendant appealed.

Countryman & Moak for the appellant. I. This being a bill of exceptions, if there is any error, however slight, which *may have* influenced the jury, the defendant is entitled to a new trial. "The court will not, on a *bill of exceptions*, attempt to speculate as to its probable effect upon the conclusions of the jury." (6 *Duer*, 339.) The decisions are uniform, that if it *may possibly* have influenced the verdict, a new trial will be granted. (1 *Duer's R.* 430, 433. 6 *Hill*, 292 296, *note b.* 19 *N. Y. Rep.* 299. 18 *id* 546.

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9 *Barb.* 619. 24 *Wend.* 420, 426, 427. 19 *id.* 232. 2 *Hall*, 40. 21 *Barb.* 489, 496, 497. 23 *id.* 554, 555. 1 *Hill*, 118.)

II. The defendant having built the fence, and it all lying on his own land, he was the owner of it, and entitled to draw it all away. When one puts his own rails into a fence, or builds a new one on the lands of another, the fence being a fixture, belongs to the owner of the soil, and the title to the rails is in him, so that he is not liable to an action by him who placed them there. (*Thayer v. Wright*, 4 *Denio*, 180. *Wentz v. Fincher*, 12 *Iredell*, N. C. 297. 1 *Hilliard on Torts*, 517, *note.*) The plaintiff should, therefore, have recovered nothing, as he had no right there, and was a trespasser.

III. The judge erred in his charge to the jury "That a verdict for the plaintiff for less than \$50 damages would not authorize the plaintiff to recover full costs; that a verdict for less than \$50 damages would not entitle the plaintiff to recover against the defendant any more costs than damages; and a verdict for the plaintiff for \$50, or more, would entitle the plaintiff to recover all the legal costs and disbursements of prosecuting the action." Costs were not allowed by the common law, but are the creature of statute. They are an incident to the verdict, and are governed by it, and not the verdict by the costs. Anciently the rules in regard to damages were undefined, and their amount was left entirely to the jury; but the courts have recently been endeavoring to settle and define legal rules by which juries must be governed in estimating the legal damages which are the *legitimate* result of an injury. The courts have long been struggling to extricate themselves from *dicta* and errors, and to lay down precise rules of damages which are founded on sound reason. (*Sedg. Dam.* 203, *marg. p.*) It is one of the fundamental maxims of law that damages, in order to be the subject of recovery, must be the legal and *natural consequences of the act complained of.* (*Sedg. Dam.* 58, 584, *marg. page.*) How can it be said that

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the bringing of a suit is, in a legal sense, one of the proximate consequences of an assault and battery? The charge of the judge amounts to this: Had no suit been brought the damages may have been \$25, but as the plaintiff has brought one, in order to indemnify him, *not for the injury*, but for bringing the action, you may give him \$50, else his costs may be more than the recovery, and he would get nothing. The jury in this case gave just \$50. Costs are no more a part of the verdict than any other consequence which may flow from it. It would be equally good law to charge the jury in such a case, that if the defendant should be defeated, and he should be unable to pay the judgment, he may be imprisoned on execution. So, in assault and battery, where the defendant had offered that the plaintiff might take judgment for \$50, or any sum, it would be equally proper to charge the jury that unless the plaintiff recovered a greater sum he would have to pay the defendant's costs after the offer. So, in ejectment, that if the defendant should be defeated, the plaintiff may eject him and his family of little ones from the house, and cast them forth upon the mercies of the winds. No one would think of upholding a verdict on such charges; and yet they are all but *consequences resulting from the verdict*, not the cause of action; and have just as much principle to sustain them as the charge under consideration. "Distinctions which are not founded on a difference in the nature of things, are not entitled to indulgence; they tend to make the science of law a collection of arbitrary rules, appealing to factitious reasons for their support; consequently difficult to be acquired; and often of uncertain application." (6 *Wend.* 116.) The true rule is and should be this: The circumstances under and manner in which the injury was inflicted, are proper matters for the jury, in estimating the plaintiff's damages, for they are circumstances surrounding the transaction and which characterize it. The right of the party to the damages which the law allows a jury to give for a particular injury,

is fixed before suit; the verdict of the jury is simply a *conclusive* determination of that right. How can an act (the bringing of a suit) subsequent to the injury, and after the right to the damages becomes fixed, change the rule of damages or their amount? If a resort to the ordinary legal remedies afforded by the court should be allowed to affect the amount of the verdict, why not in one case as well as another? Would not the question whether the plaintiff should have full costs or not, be a novel one, as the only question for discussion in the jury-room? The legislature, *as matter of public policy*, has provided, (*Code*, § 304, *sub. 4*.) that *in order to repress petty litigation*, unless the plaintiff's damages are \$50 he shall not recover full costs. In extending the class of actions where the plaintiff should recover no more costs than damages, unless the recovery exceeded \$50, the revisers wisely said: "It is hoped that by this provision, a temptation to, and, of course, a fruitful source of litigation, will be destroyed." (3 *R. S.* 2d ed. 795 § 6.) The law was designed to deter parties but little injured from coming into court and consuming its time by petty grievances; and is founded on the well known maxim, "*De minimis non curat lex*." This is a matter of statute policy with which juries are not, and should not be allowed to interfere. Suppose a party to be injured to the extent of \$25. Charge the jury that if he recover only that sum, it will really cost him more than the recovery, and, in order that he may lose nothing, they may give enough to carry costs; and they reason that he ought to have his \$25 clear of expense; and who can doubt that their verdict, as in this case, will be just enough to carry full costs? If such be the law, truly there will not be much risk in this class of actions hereafter. If he ought to have full costs when he recovers \$25, change the law, but in order to indemnify him why mulct the defendant in \$25 extra damages, which the plaintiff ought not to have, and are only given for the reason that it is necessary to do so that the plaintiff may recover full

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costs. It was asked at the circuit, "Do you object then to the jury being told what you admit the law to be?" To this we answer: It is the duty of the judge to charge the jury as to the rules of law by which they are to be governed in determining the points necessarily and legally brought under their consideration; but if he charge them on some point which does not *legitimately fall within their province*, even though he charge the law correctly, the judgment must be reversed, if the party excepting may have been injured by the charge. The error is not in the principle of law, but in the instruction to the jury that it is proper matter for their deliberation. (15 N. Y. Rep. 524. 12 Barb. 84, 94. 1 Denio, 583. 1 Wend. 510, 514.) It by no means follows that because a legal proposition is correct, the judge has a right to so charge the jury. He has no such right unless it bears upon some question upon which the jury are required to pass. So, it is said, it is presumed that every man knows the law, and consequently, that the jury knew it. This presumption applies only to the effect of acts, so far as the parties to a transaction are concerned, and is founded on the principle that, as a matter of public policy, no one should be allowed to plead ignorance of the law as a shield from punishment or the consequences of his contracts. It does not obtain in courts of justice; else the charges by our judges are useless and unauthorized, and a judgment could never be reversed for error committed by the judge. The judges declare the law, and the jury are bound by it as expounded to them. They have to do with facts only. (2 Barb. 568.) But suppose, for the sake of the argument, the presumption does obtain. The presumption, if any, must be that their knowledge of the law was correct, and hence they knew that in their deliberations on the amount of the verdict they had nothing to do with the question of costs, and the judgment should be reversed because the judge misled them by an error in his charge. "It is presumed that the jury follow the instructions of the court in matters of law, because it

was their duty so to do ; and, therefore, if the instruction was wrong the verdict was wrong." (2 *Barb.* 569. *Sedg. Dam.* 594, 600, *marg p.*) Thus much for principle. How stands the question on authority? The authority upon which most stress was laid at the circuit was, "Why, judges so charge juries every day." Granted. Courts are even now settling legal principles in accordance with "right reason." Instead of the fact it would have been much more satisfactory to have listened to some reason showing *why* they should so charge them ; and yet, for want of a better, even the court of appeals were compelled to listen to the same argument on a kindred question. (3 *Seld.* 193.) That court however reversed the common custom, and established the question on principle, saying, "*The custom at the circuit has been to admit evidence of this character ; but I have not been able to discover, in the elementary writers on evidence, authority for the practice.*" The custom arose after the publication of the case of *Elliott v. Brown*, (2 *Wend.* 497.) No prior case or authority for it can be found. The judge's charge in that case (*p.* 498) was directly contrary to that in this case. On error the judgment was reversed, on the ground that he who commits the first assault may recover if his adversary uses undue force, Savage, Ch. J. saying, (*p.* 500,) "But *without deciding* whether the refusal of the judge to state the law, relating to costs, to the jury was erroneous, I am of opinion that the judgment should be reversed on the first point." It is true that just previously, without citing any authority, or giving any reason why the law should be so, except, that "It is the duty of the jury to ascertain what damages the plaintiff has sustained ; and *also how much the defendant ought to be punished.*" The court had stated that the judge's direction to the jury in reference to the amount of their verdict was strictly correct. Ch. J. Savage "*seems*" to be of opinion (and so the reporter gives it) that the judge might have charged as requested. The first sentence given above is undoubtedly correct, but

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the second is directly contrary to the decision of the court of appeals in *Dain v. Wycoff*, (3 *Seld.* 193,) where the court says, "There can be no reason why twelve men, wholly irresponsible, should be allowed to go beyond the issue between the parties litigating, and, after indemnifying the plaintiff for the injury sustained by him, proceed, as conservators of the public morals, to *punish the defendant in a private action.*" Although the reason given by Ch. J. Savage has been exploded, judges with only now and then a challenge from the bar, have so charged juries every day since. Reason is the soul of the law, and when the reason of a rule ceases the rule itself ceases. After diligent search of the reports and elementary works, we have been unable to find either a case or elementary authority outside of this state, which sanctions such a doctrine; and the only subsequent case here is founded upon that *dictum*, without any attempt to reason upon the question, or arrive at any principle, or any other authority to sustain it. The reason on which the *dictum* was founded having been disapproved by the court of appeals, this court should promptly correct so common an error. (27 *Barb.* 147, 148.) Where a decision may have been acted upon, and the title to real property depend upon it, or parties undoubtedly framed their contract upon it, the rule of *stare decisis* is one of much force, but it has never had any weight when it is contrary to every principle of law, and only the rights of the parties litigant in the particular case are dependent upon it. (1 *Comst.* 255. 17 *N. Y. Rep.* 543. 2 *Barb.* 288. 9 *id.* 543. 13 *id.* 359.) It has well been said, "It has come to pass that *precedent* in its ancient and technical power is hardly known to the courts at all, and that "a case"—once so much sought for, so deferentially listened to, and so scrupulously followed—is now much less inquired after than "a principle" and "a reason." But even in our own state, *Elliott v. Brown* has not passed unscathed. It was shaken, and substantially overthrown, in *Hicks v. Foster*, (13 *Barb.* 663,) the court saying (*p.* 666,)

“If, however, the plaintiff can sustain the principle put forth in that case, that the jury may take into consideration the expenses to which the plaintiff has been put in prosecuting his suit, and they act upon the principle, (as I maintain they must, if it is sound,) then there will be no risk in this class of actions hereafter.” The reasoning and principles of the following cases necessarily overthrow the dictum in *Elliot v. Brown*. (*Hicks v. Foster*, 13 Barb. 663. *Dain vs. Wycoff*, 3 Seld. 191. 18 N. Y. Rep. 47. *Myers v. Malcom*, 6 Hill, 292, 296. *Palmer v. Haskins*, 28 Barb. 91.)

IV. In any event, if the charge of the judge, in regard to costs, was strictly correct, he erred in refusing to charge the jury as requested by the defendant's counsel, “That in case they should find for the plaintiff, in arriving at the amount of the verdict they would give him, they had nothing to do with the question of costs, or whether or not their verdict would entitle him to full costs.” It is the duty of the judge, when requested, to charge a proposition applicable to the case, if correctly put, and especially so where his charge may have erroneously misled the jury into the belief that a certain question was a proper one for their consideration. (4 Hill, 271. 1 Seld. 95, 106. 11 Wend. 83. 2 Seld. 388.)

De Witt C. Bates, for the respondent. The learned justice who tried the cause, not only charged the jury upon this question in accordance with the practice of every judge in the state, but is fully sustained by authority. In the case of *Nolton v. Moses*, (3 Barb. S. C. Rep. 31,) decided by Justice Willard at general term, it is held that “It is proper for a circuit judge to apprise the jury as to the effect of their verdict upon the parties, in respect to the question of costs.” Justice Willard in his opinion, on page 34, says, “It is common experience to apprise the jury as to the effect of their verdict upon the parties, in respect to the question of costs; and the practice has been expressly and repeatedly approved;”

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and he cites *Elliott v. Brown*, (2 Wend. 49.) In the case of *Elliott v. Brown*, which was an action for *assault and battery*, Ch. J. Savage, who delivered the opinion of the court, on page 500 says, "It is the duty of the jury to ascertain what damages the plaintiff has sustained, and also how much the defendant ought to be punished; and if the jury consider the costs as a part of the amount which the defendant should pay, and wish to give no greater damages than barely enough to carry costs, or to give such a sum as will not carry costs, they have a right so to do." The charge of Justice Campbell was, therefore, fully sustained by practice and authority, and the judgment should be affirmed, with costs.

By the Court, CAMPBELL, J. This was an action of assault and battery, tried before me at the circuit. Among other things I charged the jury that a verdict for the plaintiff for less than \$50 damages would not carry full costs, but would entitle the plaintiff to an amount of costs equal to the amount of damages; and that a verdict for fifty dollars or more would entitle the plaintiff to his full costs; and I refused to charge that in arriving at the amount of their verdict they had nothing to do with the question of costs. The charge and refusal to charge were duly excepted to by the defendant's counsel, and these exceptions raise the only question in the case. Until this time I had supposed that there was no difference of opinion on the points raised; and the practice at the circuit of instructing the jury as to the effect of their verdict in actions of torts, especially in actions of slander, libel and assault and battery, was at least general if not entirely uniform—when the judge was requested so to charge; and further, that such instructions were very often given to the jury when not requested, where it might seem to the judge that the ends of justice required it. Statutes limiting the costs for the purpose of preventing trifling and malicious actions were passed in the reigns of Elizabeth, James First and Charles Second. The principal statute was passed in the

reign of Charles Second ; and it enacted that “ In all actions of *trespass, assault and battery* and other *personal actions*, wherein the judge at the trial of the cause shall not find and certify under his hand upon the back of the record that an assault and battery were sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff’s declaration was chiefly in question, the plaintiff, in case the jury shall find the damages to be under the value of forty shillings, shall not recover or obtain more costs of suit than the damages so found shall amount unto.” In cases of assault and battery and trespass the certificate of the judge would regulate the costs ; in all other *personal* actions the verdict alone regulated them. Our statute, with which we have to do in the present case, was formerly as follows : “ If the plaintiff in an action for assault and battery or false imprisonment, or for slanderous words or for libel, brought in the supreme court, recover fifty dollars or less, such plaintiff shall recover no more costs than damages.” (2 R. S. 613, § 6.) The revisers in their notes say that by this provision it was hoped a fruitful source of litigation might be destroyed. The code (§ 304) enlarges this class, adding other personal actions and granting full costs when the plaintiff recovers fifty dollars or over. Most of the actions enumerated and which have in all time formed an element of litigation, are the fruits of the worst passions of our nature. They are the children of anger, malice, revenge, and “ all uncharitableness.” Hence in most cases the jury have been authorized to render verdicts which may not only compensate the plaintiff for his damages sustained, but also may add thereto what is sometimes termed smart money, sometimes exemplary and sometimes punitive damages. In an early and important case in this state, and which attracted much attention at the time from the character of the parties, that of *Tillotson v. Cheetham*, (3 John. 56,) Chief Justice Kent told the jury that he did not accede to the doctrine that the jury ought not to *punish* the defendant in a civil

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suit, for the pernicious effect which a publication of this kind was calculated to produce in society." On a motion made to set aside the inquisition, Elisha Williams contended that "In a private action, the party can recover only for the private wrong; he has no concern with the public offense, for which the defendant must atone on an indictment." But the chief justice, again speaking for the court, said, "It is too well settled in practice and is too valuable in principle to be called in question." For more than half a century that has been settled law in this state, although from time to time efforts have been made to alter the rule, especially as to those offenses where the party is liable both to a civil action and to indictment. Where, therefore, in an action for slander, libel or assault and battery, the jury know or are told that they may give exemplary or punitive damages, it is of vital importance that they should be informed as to the effect of their verdict on the question of costs. The jury not only render the verdict of guilty or not guilty in these *quasi* criminal actions, but they also pronounce the sentence, in the same breath. In a very large proportion of these actions the question of costs is the most important question in the case, and no one who has had experience on the bench can have failed to see that a full knowledge by the jury on this point is often absolutely necessary in order to enable them to render what they consider a full measure of justice to the parties. Thus in *Elliott v. Brown*, (2 *Wend.* 497,) the jury requested instruction as to what amount of damages would carry costs. The instruction was not given. When the case came up to the supreme court from the New York common pleas, where it was tried, Chief Justice Savage said: "It is the duty of the jury to ascertain what damages the plaintiff has sustained, and also how much the defendant ought to be punished; and if the jury consider the costs as part of the amount which the defendant should pay, and wish to give no greater damages than barely enough to carry costs, or to give such a sum as will not carry costs, they have a right to

do so. I think, therefore, it would have been proper to have given the jury the information they wanted." That was an action for assault and battery. In *Nolton v. Moses*, (3 Barb. 31,) Mr. Justice Willard, who had a large experience as a circuit judge before he came on the bench under the new constitution, says: "It is common experience to apprise the jury as to the effect of their verdict upon the parties in respect to the question of costs; and the practice has been expressly and repeatedly affirmed." The decision in *Hicks v. Foster*, (13 Barb. 663,) in no way conflicts with the ruling in the case before us. In that case the judge at the circuit instructed the jury "that they had a right to take into consideration the fact that the plaintiff had been compelled to come into court in order to vindicate her character." The law regulating costs and the question of punitive damages were not alluded to. The instruction was understood to mean that the jury might award to the plaintiff the damages which she had sustained by reason of the slander, and in addition might give compensation for all the expenses, costs and counsel fees consequent on coming into court. There was no attempt to call in question the rule, in *Elliott v. Brown*. Mr. Justice Marvin giving the opinion of the court says correctly, "*Elliott v. Brown*, however, has no application to the question we are considering." I think the ruling at the circuit was right, both on principle and authority. The judgment must be affirmed.

Judgment accordingly.

[BROOME GENERAL TERM, January 27, 1863. *Parker, Campbell and Mason*, Justices.]

EVANS and others, executors &c., *vs.* WILCOX.

S. being the owner of premises covered by a mortgage given by a former owner, W. applied to him for \$85, and on obtaining that sum, executed the following instrument: "Received, Deposit Oct. 8, 1859, from S. at the hand of E. eighty-five dollars which I promise and agree shall be indorsed on bond and mortgage known as the John Peters mortgage, which I have an interest in." W. was not the holder or owner of the Peters mortgage, at the time; having at most, only some equitable or beneficial interest therein. The money was never indorsed on the Peters mortgage, nor repaid to S. The bond and mortgage came into the hands of a bona fide holder, who paid for it the full amount appearing due, and without deducting the \$85. A junior mortgage was subsequently foreclosed, and the property was sold, subject to the Peters mortgage, and without any deduction or credit of the \$85. *Held* that an action would lie, by the executors of S., against W. to recover damages for a breach of the agreement contained in the receipt.

APPEAL from a judgment entered upon the report of a referee. The action was brought by the plaintiffs as executors of Henry Sheldon deceased, to recover the sum of \$85, with interest which was paid to the defendant, on the 8th of October, 1859, by Henry Evans, one of the plaintiffs, as agent of said Henry Sheldon, upon a bond and mortgage given by Uriah Gregory to John Peters, which said Sheldon had assumed and was bound to pay. The referee found and determined as questions of fact, that some time prior to the 1st day of November, 1859, Uriah Gregory made, executed and delivered to John Peters a bond for the payment of money, and to secure the payment thereof, also made, executed and delivered to said Peters a mortgage upon certain real estate. That John Peters died over ten years since, leaving among other children, Henry Peters, John Peters and the defendant in this suit, said defendant being entitled to a share of the estate of her said father. That said John and Henry, children as aforesaid, were duly appointed the executors of the said John Peters, deceased, as well by his last will and testament as by the proper legal tribunal. That said executors, in 1857, duly assigned said bond and mortgage to Elizabeth

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Peters, wife of said John Peters, jun. who thereupon became the owner of the same. That said Elizabeth Peters in the year 1858 or 1859 duly assigned said bond and mortgage to Henry Peters aforesaid, and on or about the 12th day of September, 1860, said Henry Peters assigned the same to one Ira Davenport, who became the legal owner thereof. That the real estate covered and affected by said mortgage was sold and conveyed by said Uriah Gregory to Henry Sheldon. That after such conveyance to him said Sheldon died, and at the time of his death was seized of said real estate. That said plaintiffs are his executors duly appointed; said Sheldon having left a last will and testament. That after the time said Elizabeth Peters was so the holder and owner of said bond and mortgage, the defendant applied to her for some money on her share of her father's estate. That said Elizabeth sent her to Mr. Henry Evans, one of the plaintiffs, but who then was an agent of said Henry Sheldon, who was then living, to get some money on said bond and mortgage. That Evans paid to her the sum of \$85 on the 8th day of October, 1859, whereupon she executed to him a receipt of which the following is a copy: "Rec'd, Deposit Oct. 8, 1859, from Henry Sheldon by the hand of Henry Evans, eighty-five dollars, which I promise and agree shall be indorsed on bond and mortgage known as the John Peters mortgage which I have an interest in. \$85.

LOUISA WILCOX."

That by said receipt the defendant for a valid consideration agreed to see that said sum was legally indorsed and applied upon said bond and mortgage. That when Henry Peters assigned said bond and mortgage to Davenport he guarantied that there was due thereon the sum of \$4328.23. That said \$85 was not included as having been paid thereon, and that the same never was applied on said bond and mortgage by the defendant nor was it ever indorsed thereon, nor did Sheldon during his life nor his estate since his death have any benefit from the payment thereof allowed to him on said bond and mortgage. That on the 1st day of October, 1857, Shel-

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don gave another mortgage on the same premises to Davenport for the sum of \$20,000, which was subsequent to the Peters mortgage. That said second mortgage was duly foreclosed in equity and the premises sold thereon for the sum of \$7000, to said Davenport, who was the highest bidder for the same; that such sale was made and the premises struck off subject to the said Peters mortgage; that previous to the commencement of this suit Evans, the plaintiff, demanded said \$85 of the defendant, which she refused to pay; and that said sum of \$85 with interest, being \$16.54, was justly due and owing the plaintiffs; and as matter of law that they were entitled to recover the same of the defendant with costs of this suit, said principal and interest being in all \$101.54.

T. More, for the appellant.

T. H. Wheeler, for the respondents.

By the Court, CAMPBELL, P. J. The decision of the referee was clearly right. The defendant obtained the money sought to be recovered in this action, and executed the following instrument: "Received, Deposit October 8, 1859, from Henry Sheldon at the hand of Henry Evans, eighty-five dollars, which I promise and agree shall be indorsed on bond and mortgage known as the John Peters mortgage, which *I have an interest in.*" It was both admitted and proved that this money was never indorsed on the bond and mortgage, and there is no pretense that it was ever repaid. The action is for a breach of the contract. It is very clear that the defendant never fulfilled the contract. She had no legal title to or control over the bond and mortgage. They had belonged to the estate of her father, and the executors of her father's estate had assigned them to one Mrs. Elizabeth Peters. How the latter held them—on what trusts or conditions—does not appear; nor does it appear whether the defendant under her father's will was entitled to a certain portion of this bond

and mortgage, or to a certain sum of money, or to a certain undivided portion of his estate. The bond and mortgage was transferred by Mrs. Peters and came into the hands of a bona fide holder for full value, and on payment of the amount appearing due, and without deducting the \$85. A junior mortgage was foreclosed and the property sold subject to the mortgage referred to in the receipt, and without any deduction or credit of the \$85. When Mrs. Peters sold the bond and mortgage a portion of the proceeds was paid to the defendant, and in the settlement no credit was given by the defendant for this \$85, and no reference made to it.

The case is very different and clearly distinguishable from *Seymour v. Lewis & Whitney*, (19 Wend. 512.) In that case the defendants were the owners and holders of the bond and mortgage. They gave a receipt which was, says Mr. Justice Bronson, "for so much money to be indorsed when the note was paid." The court held that when the note was paid it was a satisfaction of so much of the mortgage debt, and that the assignee took the mortgage subject to all equities. The action was assumpsit to recover back the money paid. In this case the defendant was not the holder; nor was she the owner. At most she only had some equitable or beneficial interest in the mortgage. She entered into an express contract that the money she received should be indorsed on a mortgage which she did not pretend to own, but which she only claimed to have an interest in. That contract she has not fulfilled, and this action is brought to recover damages for its breach. But it is said that Mrs. Peters, who it is claimed was at the time the holder of the mortgage, authorized the defendant to procure the money on her account as such holder. Now the defendant says that Henry Sheldon, the plaintiffs' testator, was present when she received the \$85, and when of course the arrangement was made. Her examination as a witness was therefore objected to. But even if we admit it I do not think it proves any such arrangement or agreement. She testifies that Mrs. Peters owed her and told her to go to Mr. Evans, the

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agent of Sheldon, and get money which she owed her on the mortgage, and that she went to Evans and got the \$85 and gave the receipt. There is not a word to the effect that she communicated her authority, or that there was any agreement or understanding that the money was paid through her to Mrs. Peters. On the contrary the receipt, or rather agreement, which the defendant executed, tends strongly to show that the money was paid or advanced to the defendant exclusively on her own account and credit; Sheldon and Evans knowing, either from previous information or being then informed that she, the defendant, had some interest in the mortgage, and relying upon her good faith and ability to have the proper indorsement made.

In any event the decision of the referee was right. In my opinion the defendant has established no defense, either legal or equitable, and the judgment should be affirmed with costs.

[BROOME GENERAL TERM, January 27, 1863. *Campbell, Parker and Mason, Justices.*]

DAVID COLDEN MURRAY, receiver &c., vs. CORNELIUS VANDERBILT.

Although the Rivas-Walker government, in Nicaragua, was not recognized by the United States in February, 1856, when that government made a decree annulling and revoking the charter of the Accessory Transit Company, yet such decree still remaining in force and being enforced by the government of Nicaragua, in May, 1856, when that government was recognized by the United States; *Held* that from the latter period, at least, if not from the time of its date, the decree must be considered as a valid act of the government of Nicaragua.

Held, also, that if the decree was not void at the time of its passage, the recognition of the government by the United States in May, 1856, would have a retro-active effect, so as to give validity in this country to the decree previously made, so far as to enable the courts here to act on it as affecting the charter.

Considering that decree as valid its effect was not such as absolutely to dis-

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solve the company, and make a service of process on its officers void; but it left the corporation still in existence, for certain purposes.

And the corporation being still in existence, a receiver could derive title to its property, under proceedings instituted against the corporation by creditors.

No power can be exercised by the supreme court, over a foreign corporation, in proceedings commenced by a stockholder, to wind up its affairs.

But, for the purpose of preserving the property of such corporation, for the benefit of creditors or stockholders, a court of equity has ample power to take charge of it, and to appoint a receiver.

An appearance of a corporation, by officers of the court, will be valid and give jurisdiction, whether the service of process upon its officers be good, or not; provided the corporation is still in existence.

Where the president and secretary of a corporation executed an assignment of its property, and attached the seal of the company thereto, without any specific authority from the company to do so; *Held* that it was not a proper execution of the instrument; and that the want of authority on the part of the officers could not be cured by any proof of execution made before the commissioner.

An agreement was made between the Pacific Mail Steamship Company and the Accessory Transit Company, by which the former company was to pay to the latter a certain sum per trip, or per month, so long as the boats of the Pacific Company should run without opposition. *Held* that in an action brought by the Transit Company against the Pacific Company, although the contract was immoral and in restraint of trade and commerce, the court would not enforce it against the delinquent party, or, if the money had been paid, enable the party paying to recover it back, but would leave the parties as the law found them; both being *in pari delicto*. Yet that the rule did not apply to an action by one of the principals in such a contract, against its agent who had received money thereon.

Money having been paid voluntarily, to an agent, for his principal, by a party who could not have been compelled to make such payment, it becomes the property of the principal, in the agent's hands, for which the agent should account. He has no right to refuse payment to his principal because the latter had not a legal claim to the money paid.

An agent has no right to dispute the title of his principal to moneys received by him for the use of the principal. Nor can he resist an action for the amount so received, on the ground that the money was paid on an illegal contract between the original parties.

After a corporation has virtually ceased to exist, and for all purposes of business, and for promoting the objects of the charter, all its powers have been taken away, its property all expended, and the company is hopelessly insolvent, it is not improper for the president of the company to enter into arrangements on his own behalf, for carrying on and continuing for his own benefit the business formerly conducted by the company, under an

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agreement not imposing any duty or obligation upon the corporation, or involving any use of its property.

The being president of an insolvent corporation will not prevent one from doing what the corporation has lost all ability to do. After the company has virtually ceased to exist, and its powers have been taken away, the reason and policy of the rule prohibiting a trustee from making agreements for his own benefit, ceases also.

Where the president of a corporation, holding a mortgage upon vessels of the corporation, given to secure him for advances made, and for bonds of the company held by him, and authorized by the company to sell the vessels as its agent, sold the same, at private sale, to his son, taking his note for the purchase money, payable in a year, he still keeping the control and management of the vessels and rendering no account to the purchaser for the use of them; *Held* that such a transaction could not be upheld; and the sale was ordered to be set aside, and the agent directed to account to the company for the proceeds of the vessels, when subsequently sold by him.

THIS was an action for an accounting by the defendant. The facts appear in the opinion of the court.

A. J. Parker, Henry A. Cram and John Sherwood, for the plaintiff.

H. F. Clark, C. O'Connor, Daniel Lord and Charles A. Rapallo, for the defendant.

INGRAHAM, J. This action is brought by the plaintiff, as receiver, appointed in various actions against the Accessory Transit Company for the collection of debts due from the company. The first was in an action of the Pennsylvania Coal Company, commenced about the 30th of March, 1858, founded upon a judgment recovered on the 21st day of November, 1856, and setting forth the insolvency of the company, the issuing of an execution, and its return unpaid; that the company had a large amount of property in New York which could not be reached by execution, and praying that a receiver be appointed, and that judgment be rendered that the corporation be dissolved. This action was commenced by service of the summons on the secretary of the company on the 27th of October, 1856. In May, 1858, an

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order was made at special term for the appointment of a receiver, and the plaintiff was so appointed on the 31st of May, 1858.

The second was by George Hussey and others, plaintiffs, against the Company, commenced in June, 1856, by service of a copy of summons on the secretary, founded on a judgment recovered on the 20th of December, 1856; and in October, 1858, an order was entered for the appointment of a receiver, and the plaintiff was again appointed receiver in October, 1858.

The third was in an action by Edward M. Robinson and others v. The Accessory Transit Company, commenced in May, 1858, founded upon a judgment recovered December 20, 1856, in an action commenced in November, 1856, by service of summons on the secretary of the company. In this action the defendants appeared by attorney, and on the 27th of December, 1858, the plaintiff was appointed receiver.

The fourth was in an action by James S. Sandford and others v. The Accessory Transit Company, commenced in October, 1858, founded upon a judgment recovered the second of December, 1856, in an action commenced on the 10th of November, 1856, by service of summons on the secretary of the company.

On the 6th of November, 1858, an order was made for the appointment of a receiver, and on the 18th of January, 1859, the plaintiff was appointed receiver. Subsequently other actions were brought and judgments recovered, and similar orders were made appointing the plaintiff as such receiver. In December, 1858, an action was commenced by George C. Anthon, a stockholder of the company, in behalf of himself and all other stockholders of the company, setting out the recovery of the judgments; the insolvency of the company; that the company had property in the state; that the state of Nicaragua had by a decree dated 18th of February, 1856, professed to annul and revoke the charter, and had taken possession of the property of the company, and asking the

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appointment of a receiver to take the property and distribute the same among the creditors and stockholders of the company. No appearance was entered for defendants in that action, and on the 12th day of January, 1859, an order was entered appointing the plaintiff receiver therein. Under the order made in the action of Sandford and others, James M. Cross, as president of the company, and L. Wardell, as secretary, executed an assignment to the receiver, of all the effects of the company, to which was annexed the seal of the company; and there was also attached a certificate of a commissioner of deeds, that the same was duly executed by the president of the company.

On the 27th of January, 1859, the plaintiff obtained leave to bring this action. In his complaint the receiver sets up his title under the judgments before stated, and under the assignment, and avers that the company was incorporated under the laws of Nicaragua, and had an office for the transaction of business in New York. That prior to January, 1856, the company was engaged in a profitable business in transporting passengers and freight across the isthmus of Nicaragua, and to New Orleans and elsewhere. That the company owned large and valuable steamers and lake boats, and other property necessary for such business. That the value of the property was large, and its business was profitable. That on the 3d of January, 1856, the defendant was appointed general agent of the company, and on January 30, 1856, was elected president of the company. That on February 18, 1856, a decree was issued by Rivas, claiming to be the president of the state of Nicaragua, under which decree the property of the company on the isthmus was seized and taken from the company, and its operations from that time suspended. That in March, 1856, further powers were conferred upon the defendant as agent and president, to do all such acts as were necessary to extricate the company from its difficulties and restore its rights. That under such agreement the defendant made a contract with

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the Pacific Mail Steamship Company for the payment of \$40,000 per month to the company, so long as no line should be run to and from New York and San Francisco by the company in opposition to the Pacific Mail Steamship Company. That the agreement had continued in force down to the commencement of the action; and that the defendant had received under it over \$1,200,000. That the defendant, acting as president, accounted for and paid over to the company \$40,000; and alleging that the residue had not been paid, but was wrongfully retained by the defendant. The complaint also charged that the defendant had received large sums for coal and other property, and for freight and passage moneys, which he had not paid over. The complaint also charged upon the defendant a fraudulent scheme or plan to divest the company of its property, and to acquire the same for his own use, and enumerated various acts done by the defendant for that purpose, among which were the retaining to his use the subsidy from the Pacific Mail Steamship Company, the execution of mortgages upon the ships, and the sales of the ships at an amount below their value, the sale of a portion of the ships to his son at a low price, for his own use, and improper charges in his accounts. The plaintiff asks for an accounting as to these various matters, and a decree that the plaintiff may recover the amount that shall be found to be due.

The defendant in his answer denies the right of the plaintiff to maintain this action, and his authority to act as receiver, as well as the various charges made against him in the complaint. He claims the subsidy as belonging to himself and not to the company, and alleges that he has fully accounted to the company. He also denies all frauds, as alleged in the complaint, and insists, as a defense, that there is a defect of parties to the present action.

The question which is raised as to the plaintiff's title, was made when the plaintiff rested, on a motion to dismiss the complaint, and was again renewed at the close of the case.

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The decision of this question rests upon the validity and effect of the decree of the Nicaragua government of February 18, 1856. This decree was made by the Rivas-Walker government, which was not recognized by the United States until May, 1856. Although not recognized when the decree was made, yet at the time of recognition in May, the decree still remained in force, and was enforced by that government. From the time of the recognition of the government in May, at any rate, if not from its date, that decree must be considered as a valid act of the government of Nicaragua; and I am of the opinion that where the decree was not void at the time of its passage, the recognition of the government in May would have a retro-active effect, so as to give validity in this country to the decree made previously, so far as to enable the courts here to act on it as affecting the charter. The case of *Ogden v. Folliott*, (3 Tr. Rep. 726,) which was relied on as authority against this position, is not applicable. There the party sought to be affected by a decree of confiscation in New York, during the Revolution, had returned to England, and acquired rights there in opposition to the confiscation, which could not be taken away in England by a treaty of peace and recognition of the government afterwards. A similar ruling was made in *Kennett v. Chambers*, (14 How. U. S. Rep. 38,) founded in like manner upon the agreement being void when made, and therefore deriving no force from subsequent recognition. That this decree annulled the charter and deprived the corporation of its corporate powers for all purposes except that stated in the decree, would seem to me, in the absence of contrary decisions, to be the proper construction to be given to it. And the commencement of actions and service of process on officers of the company, when there had been no election for directors or officers for two years, with the fact, as proved, that the whole business of the corporation had been suspended and the property sold by the sheriff, appears to me to have been a nullity, so far as it is relied on as the com-

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mencement of an action to give jurisdiction over the company. But it is unnecessary for me to examine this point more at length, because I feel bound by the decision of the general term of this district, in regard to this company, in which they held that the company was not dissolved by the decree. (*Hamilton v. Accessory Transit Co.*, 26 Barb. 46, 49.) Mitchell, P. J. says: "If we are bound to recognize that decree as to the rights of the company to be enforced here, or as to its property here, and to adopt the whole decree, we must consider the company as still in existence." If the company is considered as still in existence, then the objection of the defendant to a want of title in the plaintiff as receiver in the actions brought to recover debts due from the company, falls to the ground.

In regard to the proceedings by a stockholder to wind up the affairs of the company, no such power can be exercised over a foreign corporation. The only provision of our laws in regard to such proceedings against corporations limits them to corporations incorporated by a law of this state, and there is no provision by which a stockholder can thus proceed in this state against the corporations incorporated by other states. But for the purpose of preserving the property for the benefit of creditors or stockholders, I think a court of equity has ample power to take charge of it and to appoint a receiver. This undoubtedly is the rule in regard to domestic corporations, independent of any statutory provisions. Such was the case in *Lawrence v. The Greenwich Fire Insurance Co.*, (1 Paige, 587.) There the bill alleged that the corporation was dissolved, and had no officers to attend to its concerns. The chancellor said "it was evident there was no person authorized to take charge of, or to conduct the affairs of the corporation. Under these circumstances, it was proper to appoint a receiver to take charge of the effects of the company and preserve them for the benefit of the stockholders generally." The amendment of the 244th section of the code, applying the appointment of receiver

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to like cases of foreign corporations with those which existed in the case of other corporations, would extend this power to the present case, if any doubt existed prior thereto.

Although, therefore, in the proceeding by Anthon as a stockholder, the plaintiff may have asked for a greater relief in the complaint than could be granted, still he showed facts enough to warrant the appointment of the receiver, and the taking possession of the property to preserve it for the benefit of those entitled thereto. It is, however, immaterial whether or not the suit of Anthon against the Accessory Transit Company was one which could be maintained or which could give the court jurisdiction to appoint a receiver. The other actions were commenced for the recovery of debts; the summons in each case was served in the manner prescribed by law, and under the decision before referred to, whatever may be my individual opinion on this question, I must hold that the company was not so deprived of existence by the decree of the Nicaragua government as to make the service of process on its officers void.

Independent of this service, in some of the cases the defendants appeared by officers of this court, and such appearance would be valid and give jurisdiction, whether the service was good or not, if we are to regard the corporation as still in existence, notwithstanding the decree of February, 1856.

The plaintiff's title also rests upon an assignment made to him by the supposed officers of the company, as such receiver, under an order of the court directing such assignment. I cannot, however, under the evidence in this case, consider that instrument as having any validity from its execution. This assignment was dated on the 18th of January, and executed on the 19th of January, 1859, and purported to have been signed by Cross as president and Wardell as secretary, and the execution appears to have been proven by Cross. The seal affixed to the instrument was the seal of the company, and the commissioner certifies that Cross testified that

the seal was affixed by the authority of the company. This would be *prima facie* evidence of its execution, but subject to contradiction by other testimony.

The evidence shows that after the decree of the Nicaragua government, taking away the charter, in February, 1856, there were two elections of directors or officers, one on the 5th of May, 1856, and one on the 4th of May, 1857, when Cross was elected president from the 1st of June, 1857. From that time he commenced to act, and appears to have been considered by strangers as the president. But there was no proof of any authority being given to execute the paper, and his testimony conclusively shows that he had no specific authority from the company to execute any assignment, even if under the circumstances he should be recognized as the president. The affixing of the seal of the company, which in fact was the real execution of the paper, if it was executed, was also without authority. There could be no authority given, because there was no meeting of the board for that purpose. The seal was found attached to the press, and the testimony shows it had been sold by the sheriff, so attached with the press, and bought in by Mr. Cross. Such a transaction can never be considered to be a proper execution of a sealed instrument by a corporation; and the want of authority on the part of the officers cannot be cured by any proof of execution made before the commissioner. Cross states that no such proof was furnished, and there is no evidence to the contrary, except the commissioner's certificate. I consider this assignment as invalid, and executed without authority. It therefore confers no title on the receiver, if he did not obtain such title by virtue of his appointment as such in the actions before referred to.

I will now examine the various claims set up by the plaintiff, for which he asks a judgment directing an accounting against the defendant.

1st. The plaintiff, as receiver, claims to recover against the defendant for moneys received by him from the Pacific Mail

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Steamship Company for a subsidy agreed to be paid by that company for laying up the steamers belonging to the Transit Company. As to the terms of the contract or agreement there is but little if any difference between the parties. It was a verbal agreement made between Mr. Vanderbilt on the one side and Mr. Aspinwall on the other. They at the time were presidents of the two companies. Mr. Aspinwall says he proposed to pay either to Mr. Vanderbilt or to his company a certain sum per trip for each trip that the boats of the Pacific Mail Steamship Company ran without opposition, which was agreed to by the defendant. The amount to be paid was \$10,000 per trip. This is the substance of the agreement, as stated by Mr. Chauncey, who was present. Mr. Vanderbilt states the terms of the contract to be in substance the same, except that the Pacific Mail Steamship Company was to pay \$40,000 per month, on condition that they should have no opposition; making the payment per month instead of per trip. The point of difference between the plaintiff's witnesses and the defendant is, as to the party who was to receive this payment.

Without specially recapitulating the testimony in reference to this part of the case, I think the whole of the evidence, taken together, shows the intent of the parties making the agreement at that time was, that the subsidy should go to the benefit of the Transit Company. The testimony of Mr. Aspinwall shows that such was his understanding of the agreement. This is confirmed by Mr. Chauncey, who was present, and who says the payment was to be for withdrawing the ships of the Transit Company. Some of the receipts given for the first payments, signed by Mr. Allen, prior to the 11th of June, purported to be for money due the Accessory Transit Company. The receipt given on the 11th June, signed by the defendant, was for money due the Accessory Transit Company. The fact that the vessels of the company were laid up after the agreement, and the directions given to Templeton, the agent at New Orleans, to that

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effect, the account rendered by Vanderbilt to the company, containing credits for the money received from the Pacific Mail Steamship Company prior to June, 1856, and charges for such commissions on such credits; the fact that the defendant knowingly allowed the company the benefit of these payments when first made; and the exertions made by the defendant to obtain a restoration of the privileges to the company, which had been taken away by the government of Nicaragua, and in which he hoped to succeed—all lead me to the conclusion that when this agreement was first made between the parties, it was intended for the benefit of the Accessory Transit Company, and that such understanding was carried out by Allen, as the agent of the defendant, in the receipts given and accounts rendered, and by the defendant himself, down to the period when the agreement was terminated in June, or July, by an opposition being run by Morgan & Garrison. I have not deemed it necessary to advert to the contradictions in the testimony on this branch of the case, for the reason that such contradictions are very easily accounted for by the lapse of time which has taken place since those conversations. After the expiration of six years, a conversation such as that was can hardly be expected to be repeated as it took place. In fact, all the witnesses do not pretend to give the exact language, but only the substance. Under such circumstances, without imputing to any witness the least intention to misstate what took place, I think much more reliance may, and should be placed on the documentary testimony, which is not liable to be altered by failure of memory or misunderstanding of witnesses. Down to the period, then, when the first contract was terminated by the Morgan & Garrison line, and when the Pacific Mail Steamship Company refused to pay, I am of the opinion that the contract was made for the company; that the defendant was bound to account to the company therefor, and if there are any moneys remaining unpaid to the time of the receipt of 11th of June, 1856, the plaintiff is entitled to an

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account therefor. In taking such accounts, the items receipted for on the 7th July, 1856, and on the 18th of July, 1856, must be included, as they were earned prior to the time when the agreement was supposed to be abrogated by the refusal of the Pacific Mail Steamship Company to pay, on account of the opposition of Morgan & Garrison's line.

An objection is taken to this claim on the ground that the contract was immoral and could not be enforced; that being in restraint of trade and commerce, the court should not sustain it, but should leave the parties as the law found them, both being *in pari delicto*. That this rule would apply if the action was brought by the plaintiff or by Vanderbilt against the Pacific Mail Steamship Company, I have no doubt. The law would not enforce such a contract against the delinquent party; or if the money had been paid, the law would not enable the party paying to recover it back, but would leave them as they placed themselves in carrying out the agreement, viz: to act upon it as a mere honorary arrangement among themselves with which the law could have nothing to do.

But does such a rule apply to a principal and his agent who has received money for his principal on such an agreement? The money has been paid to an agent for his principal by a party who could not have been compelled to make such payment. But having been paid voluntarily, it becomes the property of the principal in the agent's hands for which he should account; he has no right to refuse payment to his principal because his principal had not a legal claim for the money on the agreement. So far as there was a contract between the Transit Company and the defendant, the contract was legal. He was to receive moneys for them and pay over to the company. An agent has no right to dispute the title of his principal to moneys received by him for the principal's use. Nor has he a right to resist an action for the amount so received on the ground that the money was paid on an illegal contract between the original parties. This was so held in *Tenant v. Elliott*, (1 B. & P. 3;) and in *Farmer v. Rus-*

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sell, (1 *id.* 296–298,) Eyre, C. J. says: “The plaintiff’s demand arises simply out of the circumstance of money being put into the defendant’s hands to be delivered to the plaintiff. This creates an *indebitatus* from which an assumpsit in law arises, and on that an action on the case may be maintained;” and again: “The case is brought to this, that the money has got into the hands of a person who was not a party to the contract, who has no pretense to retain it, and to whom the law could not give it by rescinding the contract.” Buller, J. also says, “When it appeared that the agent had received the money to the plaintiff’s use, it was immaterial whether the money was paid on a legal or illegal contract.” (*Citing Faikney v. Reynous, Burr.* 2069; *Alienbrook v. Hall, 2 Wilson*, 309.) So where a confidential relation of principal and agent exists in regard to a trust created for the benefit of the principal, the agent cannot object that the trust is void. (*Jenkins v. Eldridge, 3 Story’s R.* 182.) I know of no rule which will enable an agent for such a cause to retain in his hands moneys received by him from a third person for his principal.

2d. After the making of the original contract or agreement with the Pacific Mail Steamship Company, payments were regularly made till about 11th of June, 1856; and some payments for trips on the other side were made afterwards. About that date the Pacific Mail Steamship Company refused to pay, on account of the running of an opposition line from New York by Morgan & Garrison. Previous to this date the act of the Rivas-Walker government in taking away the charter had gone into effect. Under it the property of the Transit Company, which was in Central America, had been taken possession of by agents appointed by that government. The defendant had made exertions both at Washington and in Central America to obtain a restoration to the company of its rights and property. These efforts had proved fruitless. The route had passed from the Transit Company into the control of Morgan & Garrison, on or before the month of April, 1856.

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All the steamships of the company not seized by the Rivas-Walker government had been pledged to the defendant for advances and other moneys due him, and the possession of such ships was by resolution given to him on 12th June, 1856. The affairs of the Transit Company had become involved, their debts had accumulated, their means were all expended, and their vessels were all pledged and mortgaged for large amounts. The hope of a restoration of the charter and privileges of the company by the government of Nicaragua had vanished, and the state of the company was such as to render it almost impossible for them to run a line of steamers with the means which they possessed; and even if such a line could have been started, the vessels would have been seized on their arrival, and the passengers could not have been transported across the isthmus in opposition to the will of the existing government. The government of the United States had also recognized the Rivas-Walker government, in May preceding, and thereby had given validity in this country to the act repealing the charter of the company. It was under this state of affairs that the first agreement between the defendant and the officers of the Pacific Steamship Company was terminated by the starting of the opposition of Morgan & Garrison, and the notice from the president of the Pacific Steamship Company that they would make no further payments in consequence thereof. At that time the agent informed the president he could stop when he pleased; that he, the agent, was ready to take care of himself; and that he would run a line on his own account. In consequence of this threat on the part of the defendant, a further negotiation took place, by which the Pacific Steamship Company agreed to pay for each trip when no opposition was run, and the defendant undertook on his part to get rid of the opposition of Morgan & Garrison. This involved large expenditures on the part of the defendant in providing vessels and running opposition lines against Morgan & Garrison in the Gulf. Such expenditures were necessarily made by the defendant, because the

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Transit Company had neither the means nor the credit then to carry on such an enterprise. Without any further detail of the facts proved in regard to this branch of the case, there can be but little doubt that the defendant at this time was acting on his own behalf and not for the company. That he, considering the condition of the company hopeless, would have undertaken the expenditures of large sums of money to break down the opposition of Morgan & Garrison, without any prospect of repayment to himself, is hardly to be presumed; and my conclusion is that this second agreement for a subsidy, made about July, 1856, was made on his own account, and not for the company, and was not intended by him or the parties with whom it was made to be for any other purpose than the individual interest of the defendant.

3d. The subsequent agreements made in June, 1857, and in July, 1858, were of course of the same character, and intended for the individual benefit of the defendant, and not for the use of the company. The means, condition and prospects of the company having at those times become in a much worse condition than previously, and any prospect that might have been before entertained of its restoration having utterly failed, the defendant had been authorized by a resolution of the board to sell all of the steamers of the company for the purpose of paying their indebtedness. The question then arises whether the defendant bore such a relation to the Transit Company at this time as prevented him from making this agreement for his own benefit, and whether any rule of law exists, by which he can be compelled to account to the company for the moneys received by him under this agreement. The defendant had been the agent of the Transit Company previous to the 1st of June, 1856, under a resolution passed 3d January, 1856. This agency, by the resolution and by the agreement between the defendant and the company, terminated at that time, and there is no evidence to show its renewal. He had become a large creditor of the company by advances, and had liens on all the vessels of the company as

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security for part of such advances and for bonds issued by the company, which he owned. The relation he bore to the company was that of president and a creditor—and the question is whether there was existing as between him and the company the relation of trustee and *cestui que trust*, which rendered it improper for him to make such an agreement for his own use. I do not deem it necessary to discuss the question whether the defendant, being president of a company having the means and the power and authority to run steamers on such a route, could make a contract to lay up such steamers and take to himself a compensation for so doing. I think it must be conceded that he could not, and that such a contract would be for the benefit of the company and not of the president. But when the company had virtually ceased to exist, when, at any rate for all purposes of business, and for promoting the object of the charter as originally granted, all its powers had been taken away, its property all expended and the company hopelessly insolvent, I have not been able to adopt the conclusion that any such rule can be applied, more especially as the agreement imposed no duty or restraint on the company. The vast number of cases to which the counsel of the plaintiff has referred are cases where the agent or trustee has taken to his own benefit the property of the *cestui que trust*, or has done some act which the *cestui que trust* through him could have done for his benefit and advantage, or has used the property of the *cestui que trust* for purposes resulting in benefit to himself which might have resulted in like benefit to the person for whom he was acting. This is not the present case. The property of the company was not used; the company could not in any way have run any line to the isthmus. The company in fact had no existence for such a purpose, and the rule in regard to a misapplication of the property or rights of the *cestui que trust* cannot apply to this case. In addition to this, the agreement imposed no duty or obligation on the company, nor was it put under any restraint thereby. The company could have run a line the

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next day if it had the power and means, as fully as it could the day before the agreement was made. In order to apply this rule to the present case, we must extend it so far as to say that the defendant was prevented by his relations to the company from running any steamers to the isthmus while that relation to the company existed, and that, even after the company had lost the ability to provide vessels and run them on the account of the company. I do not understand the relation of principal and agent or of trustee and *cestui que trust* involving any such obligation. The law protects the party against the agent or trustee in the use of its property and rights, but not beyond them, and does not prevent the performance of acts which could not result in damage to the principal, or which could not conflict with the interests of the company. The being president of an insolvent corporation cannot prevent him from doing what that company had lost all ability to do, even if its existence continued. Where the company has virtually ceased to exist, and its powers have been taken away, I think the reason and policy of the rule ceases also—because no duty rested upon the agent to run the line for the company after the authority and ability of the company to do so had terminated. The case of *Abbott v. American Hard Rubber Co.*, (33 Barb. 578,) and the *Cumberland Coal Co. v. Sherman*, (30 *id.* 553,) were cases involving the sale of the property of the corporation; but even that rule is modified in the case of an officer, who is also a creditor, and acts for his own protection. (*Smith v. Lansing*, (22 N. Y. Rep. 526.)

It may well be doubted whether the terms of this agreement were at all within the bounds of the agency. The object of the charter of the company was to run vessels to the isthmus and back, not to make money by agreeing not to run. The duties of the president were only in furtherance of the objects of the charter. An agreement on his part not to run a line himself would have been to the benefit not the injury of the company if they had the means and power to continue

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their own line. The agreement on his part not to run was no violation of those duties, and no interference with or violation of the rights of the company. They were not affected by it. They had no restraint upon them by which they were prevented from running the line if they were able to do so. If it had been shown that in consequence of this agreement the defendant prevented the steamers of the company from running, another claim might have perhaps arisen out of that misfeasance. But there is no ground for that charge. On the contrary, as has before been remarked, the company were utterly without means to run the line, and so unable to pay the claims against them, that they had on June 2, 1856, obtained the consent of the defendant to purchase some of the vessels advertised to be sold to pay Morgan & Hoyt, and on the 12th of June had placed the possession of all their steamers with the defendant as security, and on 2d of August had mortgaged to him all their coal, coal hulks, &c. on the Pacific as security for advances, and gave him possession thereof; and in November, 1856, they authorized the defendant to sell all of the steamers of the company and apply the proceeds to the payment of their debts. I think there can be no doubt that after the 12th of June the company was unable to carry on its business; that its powers had ceased, and that the agreement afterwards made by Vanderbilt with the Pacific Steamship Company in no way infringed the rights or interfered with the interests of the Transit Company, and in no way violated the duty he owed to that company as the president thereof. I conclude therefore that he is not liable to account to the receiver for any moneys received by him from the Pacific Mail Steamship Company on account of the subsidy under the agreements made by him after the 12th of June, 1856.

4th. The plaintiff also claims an accounting for steamships sold by the defendant for the account of the company. These vessels were all mortgaged to the defendant for advances made by him to the company and for bonds held by him against the

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company; the validity of which is not denied. His authority to sell, therefore, cannot be disputed. All the vessels sold, excepting the Brother Jonathan, were accounted for to the company long before the appointment of the receiver. Those accounts appear to have been acquiesced in by the company. In the accounts thus rendered nothing is said of the Brother Jonathan. Lea in his testimony says that no account was ever furnished, and no evidence is given to the contrary. For the proceeds of this vessel the defendant is bound to account.

There is nothing in the evidence which would warrant the opening of the other accounts for the sale of the steamers, except that relating to the sale to William H. Vanderbilt. The other vessels appear to have been fairly sold, at a price not below their value in the condition and under the circumstances in which they were sold; and the proceeds of the sale have been accounted for to the company, and such account acquiesced in.

As to the sale of the steamers Pacific, Cortes and Uncle Sam to William H. Vanderbilt, I do not think it was such a sale as can, under the circumstances and relations of the parties, be sustained. The purchaser was his son, totally unacquainted with their value, having no occasion for the purchase. He paid no money therefor, but gave his note to the defendant, payable in a year. The defendant paid all expenses, and kept the control and management of the vessels. William does not appear to have been interested in the accounts or management of the vessels, but left all in the charge of the defendant. The defendant ran the vessels in an opposition line on the Pacific. He does not appear to have accounted or allowed for the use of them. He says he has not paid William any thing on account of them since the sale. No account has ever been rendered of these vessels by the defendant to William, nor has it ever been shown that any account between William and the defendant exists in regard to them. The negotiations for the supposed sale also, were such as to throw great doubt on the *bona fides* of the

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transaction. Under all the facts in evidence, I cannot avoid the conclusion that this purchase was rather an arrangement to get the title out of the company into the defendant. Such a transaction cannot be upheld. If the defendant had put up the property for sale, and had purchased the same in his own name, it might have been held to be good, because he had a lien upon it which he had a right to protect by purchase; but in such a case the sale should have been an open one, with an opportunity to others to compete with him for the purchase. Irrespective of his having a lien on the vessels by way of mortgage, he could not even have been a purchaser at such a sale, because the purchase would have been incompatible with his position as agent to sell. This sale must be set aside, and the agent must account for the proceeds of these vessels, as sold by him afterwards. He will be entitled to credit for all the moneys due him thereon under the mortgages, and also for all money expended for repairs prior to the sale by him.

The appraisalment of the Daniel Webster, and the appropriation by the defendant of that vessel to his own use at the appraised value, can hardly be considered within the powers conferred upon him by the resolution authorizing the sale. Had such appraisalment been submitted to the company, and their assent by resolution obtained, the case would be a different one. But the company was no party to the transaction. They had nothing to do with the selection of the appraisers, nor were they consulted by the defendant as to the appropriation and use of the steamer by himself. The bill of sale, purporting to have been executed by the Transit Company to the defendant, for the Daniel Webster, dated the 18th November, 1856, is not entitled to consideration in connection with this branch of the case, because there was no warrant for any such bill of sale in the proceedings of the company, and no resolution appears on the minutes of the company, at any time, authorizing such a sale to the defendant. The same remark may be made as to various other

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papers executed by Lea, as secretary, for which no authority can be found in the minutes of the company, and which Lea as secretary had no authority, without such action of the board, to execute. Among them are the contract with William H. Vanderbilt, bills of sale to him of the steamers, and of coal, and bill of sale of William H. Vanderbilt's note to the defendant. All these papers appear to have been executed without any other authority from the company than that of the resolution of the 13th November, 1856, and cannot be relied on as ratifying any contract between the defendant and William as to the contracts therein stated.

The sale of the coal, hulks, &c. on the Pacific to William H. Vanderbilt, is subject to the same objections, and the same rule must be applied as that in regard to the steamers, and the same accounting therefor is ordered.

The necessity of accounting as to these vessels renders it unnecessary to examine the items for repairs on them, which were charged to the company for work done after the supposed sales. As they are to be credited to the defendant in the accounting, the charges in the accounts can remain.

The charge of \$1000, for money paid to Mrs. Cazneau, does not appear to have been twice charged in the accounts of the defendant against the company. At folio 732 of Lea's testimony, there is a charge for money advanced for secret service, of \$1000, and at folio 755 there is a charge for the like purposes of \$16,180, as per account of that date on file. These items together amount to \$17,180. On referring to that account, it will be found that the items there charged are the same, with a slight variation. The sum of \$1000 in the first charge appears to have been deducted from the gross amount, and the second charge is for the balance only.

There is some evidence that the defendant, when he paid General Goicouria for secret service money, took from him one or more notes for the amount advanced.

Those notes if of any value would be the property of the

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company, and not of the defendant. The defendant must deliver over the notes, or account for the proceeds if paid to him.

The defendant objects to any recovery in this case upon the ground that the republic of Nicaragua, the commissioners appointed by that government on the repeal of the charter, the Transit Company, its stockholders and creditors, or some of them are necessary parties to this action. The receiver in this matter takes the place of the company. There could be no pretense that the company, if in existence at all, could not collect a debt due to it by action, without making any of the other persons parties. If any of those named have claims against the funds and property of the company, they can enforce such claims by affirmative action, but in the collection of debts due the company there is no propriety of involving them in such a litigation. There is no validity in this objection.

The judgment rendered must be for an accounting by the defendant—

First. For moneys received by him from the Pacific Mail Steamship Company prior to August, 1856, excepting the money receipted for on the 8th of July, 1856.

Second. For the proceeds of the Brother Jonathan.

Third. Declaring the sale to William H. Vanderbilt to have been for the benefit of the defendant, and directing an accounting by the defendant for the moneys received by him for the proceeds of such vessels when subsequently sold by him.

Fourth. For the Daniel Webster, for the value of such steamer at the time she was taken by the defendant.

Fifth. For the proceeds of sales made by the defendant of the coal, coal-hulks, &c. on the Pacific coast, or for the value thereof, if used by him.

Sixth. For any notes received by the defendant from General Goicouria for the moneys advanced to him by the defendant and charged in the account for secret service money

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against the company, or for the proceeds of any such notes if received by the defendant.

In taking such accounts it will not be necessary to open the other accounts rendered, or to direct any re-accounting as to all other items of account between the defendant and the company.

The defendant is to be allowed in his accounting for the steamships, all moneys expended for such steamships, and for repairing the same, up to the respective times of sale.

He is also to be allowed any moneys remaining unpaid of the advances by him on account of the company, for which he had a lien on those vessels, and any balance of money due from the company for the bonds held by the defendant, for which the steamships were pledged or mortgaged, and which was not discharged by the sale of the other steamships than those for which he is to account. Wherever any such items have been included in the accounts heretofore rendered, they are not to be charged again to that company.

For the purpose of taking such account, a reference is ordered, and all further directions are reserved until the coming in of the report.

[NEW YORK SPECIAL TERM, JANUARY 28, 1863. *Ingraham*, Justice.]

GOULD vs. ELLERY and others.

Where a guaranty of a promissory note is a separate instrument from the note, title to it will pass by delivery, with the note, for a good consideration. A written assignment is unnecessary.

The transfer of the note guarantied, and delivery with it of the guaranty, carries with it the title to the guaranty, without any written assignment.

ON the 28th February, 1861, the firm of T. S. Powell & Co. of New Orleans, made and delivered to the firm of Rushmore, Cone & Co. of New York, their note, dated on

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that day, for \$1784.61, payable to the order of the latter firm, eight months after date. Subsequently, on the 2d of March, 1861, the firm of Ellery, Wendt & Hoffbauer, the appellants, executed under seal, and delivered to said Rushmore, Cone & Co. a guaranty, of which a copy was set forth in the complaint, in these words :

“For and in consideration of one dollar to us in hand paid by Rushmore, Cone & Co. of the city of New York, the receipt whereof is hereby acknowledged, and of a credit given to T. S. Powell & Co. of New Orleans, La. We, Ellery, Wendt & Hoffbauer, of the city of New York, do hereby agree to guarantee the payment at maturity of a certain promissory note made by the said T. S. Powell & Co. of New Orleans, state of Louisiana, dated February 28th, 1861, and payable eight months after date to the order of Rushmore, Cone & Co. at the Bank of the Republic, New York, for the sum of seventeen hundred and eighty-four dollars and sixty one cents, and due October 31st, 1861, and it is hereby understood and agreed, that if the said T. S. Powell & Co. do not fully pay the same on or before the maturity date thereof, we waive notice of non-payment, hereby binding ourselves, our heirs and assigns, to pay the full amount of said note and interest, if any there be, within ten days after the due date thereof, without defalcation or discount.

In witness whereof we have hereunto set our hand and seal this second day of March, 1861.

(Signed) ELLERY, WENDT & HOFFBAUER. [L. S.]”

The guaranty was entirely separate from the note. Before the maturity of the note, Rushmore, Cone & Co indorsed the note, and delivered it, with other securities, to a witness, as security for an antecedent indebtedness, and, without any writing or other transfer, delivered the guaranty to the witness, with the note and other securities. After this the plaintiff paid the said indebtedness, and received the securities, with said guaranty. The action was tried before Mr. Justice JAMES, without a jury, who held that the

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guaranty was transferable by delivery with the note, and that the holder of the guaranty could maintain an action upon it. He therefore rendered a judgment in favor of the plaintiff. The defendants appealed.

E. L. Fancher for the appellants. I. The plaintiff did not produce, or put in evidence the note, to which the guaranty is collateral, nor show that it was unpaid, or that he was the holder of it. Without such evidence, the defendants' objection to the plaintiff's title to, and right to recover on the guaranty, was good; for they were not liable on the guaranty, independent of the note.

II. The payment by the plaintiff of the debt of Rushmore, Cone & Co. to a third party, and the delivery to the plaintiff of the securities held by such third party, will not constitute the plaintiff such a holder of the guaranty as to authorize him to sue upon it. *Non constat*, the plaintiff was assignee of Rushmore, Cone & Co. or paid the debt from their funds, as their representative, or under some obligation to them to do it.

III. Both the testimony and the finding of the judge are, that the plaintiff "*paid the said debt and received the securities*;" not that they were transferred to him for a consideration. The plain inference from *the payment* of the debt is, that the plaintiff was *the representative* of Rushmore, Cone & Co. against whom the defendants have a valid counter-claim.

IV. The guaranty, in its terms, is not assignable; and being a *separate* instrument from the note, the remedy on it is confined to the original parties; and, like any other indemnity, is not transferable. (3 *Kent's Com.* 7th ed. 165. *Miller v. Gaston*, 2 *Hill*, 192. *Watson's Ex'rs v. McLaren*, 19 *Wend.* 557, 568. *S. C.* 26 *Wend.* 425. *Birckhead v. Brown*, 5 *Hill*, 634.) Chitty says (12th ed. p. 250,) "It is effectual only between the original parties to it, and not transferable at law, or in equity, or in bankruptcy."

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By the Court, INGRAHAM, J. I think there can be no doubt that title to the guaranty would pass by delivery with the note, for a good consideration, and that a written assignment was unnecessary. This has been held as to a bond and mortgage. (*Runyan v. Mersereau*, 11 *John*. 534. *Prescott v. Hull*, 17 *id.* 284.)

It is also settled that the transfer of the original debt or claim, and delivery with it of the security, carried with it the title to the security, without any written assignment. (*Green v. Hart*, 1 *John*. 580. *Langdon v. Buel*, 9 *Wend.* 80. *Parmelee v. Dann*, 23 *Barb.* 461.)

The evidence showed the transfer of the note and guaranty to the plaintiff. The defendant did not in his answer allege any payment of the debt. The presumption was that the note still remained unpaid. No objection was made to the non-production of the note, on the trial, and the defendants cannot now raise it on appeal.

The evidence shows that the plaintiff paid the amount of the indebtedness, and the witness transferred to the plaintiff the note and guaranty. This is not any payment of the debt of which the defendants could avail themselves without setting up the defense of payment in their answer. It is evident these defenses were not relied on upon the trial. The case was tried on the defense that the guaranty had not been transferred, or was not assignable. On this question the ruling was proper, and the judgment should be affirmed with costs.

[NEW YORK GENERAL TERM, February 2, 1863. *Sutherland, Ingraham and Clerke*, Justices.]

MARY STEWART *vs.* ANDREW SMITH.

The provision of the revised statutes requiring notice of proceedings for the admeasurement of dower to be given to the owners of the land claiming a freehold estate therein, is not complied with by merely giving notice to the tenant or person in possession.

With the consent of a doweress, rooms in a building can be assigned for dower, but it *seems* not without her consent.

THE plaintiff applied to this court for an admeasurement of her dower in certain lots of land in the city of New York. Such lots had been aliened by the husband during his life. Since the alienation by the husband, part of the lots had been built on, by the purchaser. The commissioners, in setting off the dower, did so by awarding to the widow a strip of land on the north side of the lots, without regard to the buildings, so that the division line would pass through the buildings in a manner which would render both parts of little value to the owner. On a motion at special term to confirm the assignment of dower, the court denied the motion, and ordered the assignment to be vacated and set aside. From that order the plaintiff appealed to the general term.

George W. Stevens, for the appellant.

John C. Dimmick, for the respondent.

By the Court, INGRAHAM, J. The first objection to the assignment of dower by the commissioners is, that the commissioners should not admeasure dower in any lands except those in possession of the defendant when the action was commenced. This would be in accordance with the findings of the referee, who reported that at the time of the commencement of this action the defendant was in possession of the premises, but I do not think it would be sufficient. The evidence before the referee showed that the defendant was not the owner, but was merely in possession of the premises. This is not enough. The statute (3 R. S. 791, § 2) requires

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notice to be given to the owners of the land, claiming a freehold estate therein. This is not complied with by merely giving notice to the tenant or person in possession. *Ward v. Kilts*, (12 *Wend.* 137,) shows that notice to the owner is necessary, and that notice to the tenant is unnecessary.

I do not see how this difficulty can be obviated, in the present proceeding. The service of notice on Smith was evidently insufficient. No good could result from sending the case back to the commissioners, as their admeasurement would not affect the owner of the fee if he had no notice of the proceeding. The adverse party must have such notice. (*Rathbun v. Miller*, 6 *John.* 281. 15 *id.* 533.)

The statute provides for a service, in certain cases, upon the tenant, but even then, the notice must be to, and the proceedings against, the owner of the freehold.

We think, also, the commissioners erred in assigning the dower in such a manner as to render the findings almost useless to both parties. With the consent of the widow, rooms in the buildings can be assigned, but it seems not against her consent. Whether she did or did not assent in this case does not appear. (See *White v. Story*, 2 *Hill's R.* 543; 4 *Bradf. Rep.* 15.) And it has been said such a dower may, in cases not admitting of any other mode, be admeasured by assigning a portion of the profits, or an alternate occupation. (1 *Cowen*, 463.) It is not necessary, however, to discuss this branch of the case, as the proceeding cannot be sustained, for the reason first stated.

The order appealed from should be affirmed, and the proceeding dismissed, unless the petitioner elects to amend the proceedings in ten days.

[NEW YORK GENERAL TERM, February 2, 1863. *Sutherland, Ingraham and Clerke*, Justices.]

DEVROY vs. THE MAYOR, ALDERMEN AND COMMONALTY OF
THE CITY OF NEW YORK.

The board of supervisors of the city and county of New York have power to fix or increase the salary of the clerk of a police court; more especially if such increase is made in pursuance of an act of the legislature, or is subsequently ratified by them.

The change of the appointing power from the mayor and common council to the board of police did not relieve the corporation from liability to pay whatever it was bound to pay, before.

APPEAL by the defendants from a judgment entered at a special term, on the verdict of a jury. By an act passed in 1848, (*Laws of 1848, p. 249,*) the city of New York was divided into six judicial districts, (§§ 1, 7.) By § 3 of said act the common council of said city were to appoint and fix the salary of a clerk for each of said courts. By § 9 of said act the clerks appointed under the act were to account for and pay into the city treasury all fees and perquisites. By an act passed in 1851, (*Laws of 1851, p. 271,*) the act of 1848 was amended so that the appointment of police court clerks was given to the mayor and board of aldermen, or a majority thereof. The compensation of these clerks was to be fixed by the common council, and not increased or diminished during their continuance in office. In the same year, (*Laws of 1851, p. 958,*) § 9 of the act of 1848 was repealed, and it was provided that, "for the increase of duties hereby created, the board of supervisors of the city and county of New York are hereby authorized to increase the salaries of the justices and clerks elected and appointed under that act, or who may hereafter be elected and appointed under this act, the same to be paid out of the city treasury, on the first day of each month, and the salaries thus fixed shall not be increased or diminished during the term for which they are elected and appointed." By an act passed in 1852 (*Laws of 1852, p. 471, § 3*) it was provided that "the salaries of the police clerks shall be the same sum as fixed by the board of supervisors of the city and county of New York, by resolution

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passed on the 2d day of January, 1852. January 3d, 1852, the board of supervisors passed a resolution fixing the salaries of the clerks of police courts at \$1250 per annum. By an act passed April 10, 1855, (*Laws of 1855*, p. 502,) the mayor and the board of aldermen, or a majority thereof, were authorized to meet in convention, when directed by the board of aldermen, and appoint the police court clerks, and clerks of district courts. December, 13, 1855, the boards of supervisors adopted a resolution directing that the clerks of the police courts be paid, for extra services, in addition to their existing salary, at the rate of one-sixth of the compensation they then received. By an act passed March 10, 1857, (*Laws of 1857*, vol. 1, p. 197,) that resolution was "declared to be lawful, and of binding force." By an act passed April 15, 1857, (*Laws of 1857*, vol. 1, pp. 211, 212,) it was provided that "the board of police shall appoint all court clerks prescribed to the judicial districts in which police justices are elected in the city and county of New York, and it shall designate the courts at which they shall do duty respectively." By § 35 of said act (*Laws of 1857*, vol. 2, p. 218) it was provided that "all statutes, parts of statutes and provisions of law, inconsistent with the provisions of this act, are hereby repealed." The mayor and aldermen met in convention, December 31, 1857, and appointed Edwin Bouton as clerk of the first district police court. Bouton assigned his claim for salary as such clerk for April, May and June, 1858, to Devoy, the plaintiff here, who brought this suit for three months' salary, claiming to be paid by the corporation at the rate allowed by the two resolutions of the board of supervisors of January 3, 1852, and December 13, 1855. At the trial the defendants' counsel objected to the admission as evidence against the defendants of either resolution of the board of supervisors. It was also claimed by the defendants' counsel that the acts of 1851 and 1855, so far as they gave the power of appointing clerk to the mayor and aldermen were repealed. The court below overruled the

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objections as to admissibility of the resolutions, and directed a verdict for the plaintiff for \$459.68.

J. E. Develin and *Geo. R. Thompson*, for the appellants.

Felix Hart, for the respondent.

By the Court, INGRAHAM, J. The question raised in this case was examined and decided in the common pleas, in *Canniff v. The Mayor &c. of New York*, (4 *E. D. Smith*, 430.) It was there held that under the act of 1851 the supervisors might fix the salary of the clerk of a police court, and that he could recover the same from the defendants. The same rule would apply to a subsequent increase of salary; more especially if such increase was in pursuance of an act of the legislature, or was subsequently ratified by them.

The change of the appointing power from the defendants to the board of police did not relieve them from liability to pay whatever they were bound to pay before.

The same principle was stated by Nelson, Ch. J. in *The People ex rel. Lynch v. The Mayor &c.* (25 *Wend.* 680, 685,) in which the judges of the sessions sought to recover from the defendants the salary given by the statute. He says: "This was a legal duty enjoined by competent authority, which the corporation are bound to discharge. It is as binding on them as if entered into under their corporate seal."

These cases are so conclusive on this question that no further examination is necessary.

Judgment affirmed with costs.

[NEW YORK GENERAL TERM, February 2, 1863. *Sutherland, Ingraham and Clarke*, Justices.]

FRANCIS LEE, executor &c., *appellant*, vs. WILLIAM LEE
and others, *respondents*.

A testator directed the residue of his estate to be divided between his brother William, and the children of his deceased sister Ellen, and the daughter of his brother John, in equal proportions, share and share alike. *Held* that a decree of the surrogate, directing a distribution to be made among the legatees *per capita*, giving each of the nephews and nieces an equal share with the brother of the testator, applied the correct rule of distribution.

A surrogate has no authority to award counsel fees, to be paid out of the estate of a decedent, to both of the contesting parties. He can only give costs to the successful party; and they are to be taxed at common pleas rates; that is, as they existed in 1837.

THIS is an appeal from a decree of the surrogate of the county of New York, dated the 14th day of May, 1861, directing the distribution of the estate of the appellant's testator, Hugh Lee. The appeal is taken on the ground that the distribution should have been made among the legatees named in the fourth clause of the will, *per stirpes* and not *per capita*. The clause of the will under which the distribution directed by the decree was made, provides that the residue of the estate shall be divided as follows, viz: "Between my brother William Lee, and the children of my deceased sister Ellen Keany, and the daughter of my brother John Lee, in equal proportions, share and share alike." The surrogate directed a division, in equal shares, between the brother, the daughter of John Lee, and the children of Ellen Keany, namely, one-eighth to each.

Felix Hart, for the appellant.

A. W. Bradford, for the respondents.

By the Court, INGRAHAM, J. The testator directed the residue of his estate to be divided between his brother William and the children of his deceased sister, Ellen, and the daughters of his brother John, in equal proportions, share

and share alike. The surrogate decreed a distribution among the legatees *per capita*, giving each of the nephews and nieces an equal share with the brother.

The rule as applied by the surrogate was, I think, correct. Had the testator said, "I give to my brother" and to the children of his brother and sister, naming each of them as a legatee, and added "in equal proportions, share and share alike," there would be no doubt of the right of each of the children to an equal share. The mere grouping of the children of Ellen under that title, instead of naming them individually, does not alter the rights of each. It does not appear that the testator intended to divide his estate into classes, from which the intent to adopt a different rule might be inferred. (*Abny v. Newman*, 17 *Eng. L. & Eq. Rep.* 125.)

The objection that there was no proof before the surrogate that the children of Ellen were living, is not well taken. They were parties to the proceeding before the surrogate, and were parties to this appeal. No objection of that kind appears to have been made below. We may therefore conclude that all parties assented before the surrogate to the fact of their being alive.

The surrogate allowed to the counsel of the parties counsel fees, to be paid out of the estate. The statute (3 *R. S.* 5th ed. 367, § 25) says that in all cases of contest before a surrogate's court, such court may award costs to the party entitled thereto; and sub. 23 says that such costs shall be taxed at common pleas rates; that is, as they existed in 1837.

Before the statute, the surrogate had no power to award costs, and as these provisions confined him to costs to the successful party, I see no authority to award counsel fees to be paid out of the estate to both of the contesting parties.

The portion of the decree directing the payment of the counsel fees should be reversed, and the residue affirmed.

THE MANHATTAN GAS LIGHT COMPANY vs. ELY.

C. applied to the plaintiff to be supplied with gas light and meter on the premises occupied as the Gramercy Park House, and agreed to pay for the same, on the usual terms; E. signing the application as surety. Subsequently C. ceased to be the occupant of the premises, and W. became his successor. *Held* that E. by signing the application undertook to pay for gas and meter supplied to C. at the Gramercy Park House, if C. did not pay; but that he was not liable for gas furnished to W. after he became the landlord.

Held also, that E. could not be made liable to pay for gas furnished to W., on account of C.'s neglect to give notice to the plaintiff of the change of proprietorship of the hotel.

A PPEAL by the plaintiff from a judgment entered upon the report of a referee.

Edward Fitch, for the appellant.

Luther R. Marsh, for the respondent.

By the Court, SUTHERLAND, J. This action was brought to recover the sum of \$578.50 for gas supplied one H. S. Crocker from the 20th of January, 1860, to the 18th of February, 1860, and for rent of meter during that time. This action was brought against the defendant as surety. The complaint alleges that Crocker applied to the plaintiffs to be supplied with gas light and meter; that his application was in the following words: "To the Manhattan Gas Light Company. The subscriber wishes to be supplied with gas light and meter in the premises No. — Gramercy Park street, occupied as the Gramercy Park House, and hereby agrees to pay for the same on the usual terms of the company. Succeeds Mr. Davis from this date. H. S. Crocker. Charles Ely, surety. New York, February 18th, 1856." And that thereby the said Charles Ely became and was surety for the payment by the said H. S. Crocker for all sums which might be due and owing by him for gas light and meter furnished pursuant thereto. The answer insists upon the statute of frauds as a

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defense to the action; and as a further defense, denies that the plaintiffs, from the 20th day of January, 1860, to the 18th day of February, 1860, supplied the said Crocker with the quantity of gas mentioned, or with any gas whatever, or with any meter, as in the complaint stated. And the defendant alleges in the answer that the plaintiffs did not supply Crocker with any gas after the 8th day of June, 1859; that before the day last aforesaid, Crocker ceased to be proprietor of the Gramercy Park Hotel, and that since that time the gas had been furnished to C. W. Woodhull, who then became the proprietor of the hotel. On the trial before a referee, the defendant admitted that the plaintiffs had furnished the Gramercy Park House with the quantity of gas mentioned in the complaint during the time mentioned in the complaint, but contested his liability to pay for the gas so furnished. It appeared on the trial before the referee, and the referee found as matters of fact, that Crocker paid for all the gas furnished for the Gramercy Park House from the time of the execution of the written instrument mentioned in the complaint to the month of June, 1859; that in June, 1859, Crocker ceased to be the occupant and landlord of said house, when Charles W. Woodhull succeeded as occupant and landlord of the house, and continued such landlord and occupant up to the 20th day of February, 1860; that after Woodhull succeeded Crocker, and during the time Woodhull was such landlord and occupant, the plaintiffs furnished gas for the house as they had done before, the bills therefor having been presented to Woodhull at the house and paid by him down to the 20th day of January, 1860; that weekly bills for gas from the 20th of January to the 18th of February, 1860, (being for four weeks,) were made out by the plaintiffs in the following form: "New York, 1860. Mr. H. S. Crocker to the Manhattan Gas Light Company Dr. for gas consumed from January 20th to January 27th;" (then stating in detail the amount of gas for the week;) that for the first three of these bills the agent of the plaintiffs received the checks of

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Woodhull and receipted the bills; that the checks were duly presented for payment and not paid; that the last of said bills had not been paid in any manner; that the gas bills for the house were payable weekly; that there was at no time any sign on or about the Gramercy Park House designating who was the landlord thereof; that the general bills of the house for supplies, expenses, &c. while Woodhull was landlord, were made out to him and in his name. On these facts the referee came to the conclusion that the defendant was not liable for the gas claimed in the complaint; assuming the legal validity of the defendant's agreement as set forth in the complaint.

On the facts found, it is clear that the referee came to the correct conclusion. The first ground or reason stated by the referee for this conclusion was sufficient to authorize it. By signing the written instrument set out in the complaint as surety, the defendant undertook to pay for gas and meter supplied to Crocker at the Gramercy Park House, if Crocker did not pay. He did not undertake to pay for gas furnished to Woodhull, or to any other person than Crocker. The gas furnished for the Gramercy Park House during the time mentioned in the complaint was, in fact, furnished to Woodhull, as the landlord or proprietor of the house. It is immaterial in this case, between the plaintiffs and the surety, whether the plaintiffs had notice of the change in the proprietorship of the house or hotel, or whether, as between the plaintiffs and Crocker, on the facts found by the referee, Crocker would be liable, on the ground that he did not give notice to the plaintiffs of the change of proprietorship; inasmuch as by no reasonable construction of the defendant's undertaking as surety, could he be held responsible for any default of Crocker in not giving such notice. The undertaking of the defendant as surety was, to be responsible for any default of Crocker, in not paying for the gas furnished him. He did not undertake to be responsible for any default of Crocker in not giving notice of any change of the proprietorship of the hotel. The referee did

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not pass upon the question, whether the undertaking of the defendant was void by the statute of frauds. It is not necessary for us to pass upon it, or any other question in the case.

I think the judgment should be affirmed on the ground above stated aleno.

[NEW YORK GENERAL TERM, February 2, 1863. *Sutherland, Ingraham and Clarke, Justices.*]

 COLGATE vs. BUCKINGHAM.

A promissory note given to a mutual insurance company organized under the general law of 1849, for shares of its capital stock, and in terms payable in such portions and at such time or times as the directors of the company may require, and showing on its face that it was given for capital stock of the company, is, in legal effect, payable on demand, i. e. at its date.

The statute of limitations begins to run against such a note at the time it is given, and at the expiration of six years from that time, will constitute a good defense.

THIS was an action on a note made by the defendant, and given to the Granite Insurance Company, the defendant receiving the scrip of that company for it. The note is dated February 14, 1853, and this action was commenced May 13, 1859. The complaint alleges that "on or about November 1, 1855, the amount of the note was required by the company of the defendant, according to its terms, and the note was afterwards transferred and indorsed by the company to the firm of Beebee & Co. for a valuable consideration. The firm of Beebee & Co. failing, the note came into the hands of the plaintiff as their general assignee, who brings this action. The defendant admitted, either in his answer or upon trial, the following facts, viz: *First.* The assignment, as alleged, from Beebee & Co. to the plaintiff, and that the title to the note passed by it. *Second.* That he made the note and delivered it to the Granite Insurance Company, on the day of its date. *Third.* That the consideration of the note was the scrip of the company,

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issued to and received by the defendant, and it was admitted by the plaintiff that this scrip was the only consideration. The answer then sets up, in substance, that there was no such corporation as the Granite Insurance Company, and alleges various irregularities and omissions in its organization, by reason of which, it is alleged, the corporation never had any legal existence. These are specifically stated in the answer. The answer further avers fraud on the part of the company, in pretending they were a corporation, when, in reality, they were not, and that they had no power or right to issue any such scrip as formed the sole consideration of the note, and that it was wholly worthless and void. The answer sets up various other matters by way of defense, which it is here unnecessary to state, except that it alleges that a recovery is barred by the statute of limitations.

The defenses held valid by the referee were those alleging that there was no resolution authorizing the transfer by the president of the company to the firm of Beebee and Co. and that the recovery sought was barred by the statute of limitations. The other issues were disposed of in favor of the appellant. Judgment was rendered for the defendant upon these grounds *only*, and exceptions were filed to the findings and conclusions of the referee in relation to these points only. The plaintiff appealed.

George R. Thompson, for the appellant.

William Tracy, for the respondent.

By the Court, SUTHERLAND, P. J. The judgment in this case must be affirmed, on the ground that the statute of limitations, set up in the answer as a defense to the note on which the action was brought, was a bar to the action.

It has recently been decided by the court of appeals, (*Howland, receiver, &c. v. Edmonds et al.* 24 N. Y. Rep. 307,) that a note given to a mutual insurance company, organized

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under the general law of 1849 (*ch. 308 of 1849*) as one of the notes required by the statute to make up its capital, was in legal effect payable on demand, that is, at its date; though by its terms it was payable at such times, and in such portions, as the directors might require. The note in the principal case was given by the defendant to the Granite Insurance Company, (a corporation organized under the general law of 1849,) for five shares of its capital stock, and in terms is payable "in such portions and at such time or times as the directors of said company may require." The note in *Howland v. Edwards* was in terms payable "in such portions and at such time or times as the directors of said company may, agreeably to their act of incorporation, require." There is really no material difference between the notes in respect to the times at which they are payable. In the one note, reference to the act of incorporation is made in words; in the other it is implied, or tacitly made; for the words "in such portions, and at such time or times as the directors of said company may require," mean or imply, may require, *agreeably or according to their act of incorporation*. Besides, the note in the principal case has on its face the words, "Subscription note for five shares," and in the margin the words and figures, "Capital stock \$200,000." The note therefore showed on its face that it was given for capital stock of the company.

On the authority of the decision in *Howland v. Edmonds*, the judgment below must be affirmed with costs.

[NEW YORK GENERAL TERM, February 2, 1863. *Sutherland, Ingraham and Clarke, Justices.*]

THE UNION BANK in the City of New York *vs.* GARRET
S. MOTT.

An agent acting under a general power of attorney, giving him power to draw or indorse checks for and in the name of his principal, has no authority to overdraw his principal's account at the bank.

And if over-drafts are made upon such account, by the agent, through a fraudulent collusion with a book-keeper in the bank, without the knowledge or sanction of the principal, who receives no part of the proceeds, the loss must fall upon the bank; such loss having been occasioned by the fraud of its own clerk and servant, in the performance of his duties in the bank. The bank must look for redress to its book-keeper, and his sureties, and to those who participated in the frauds.

A plaintiff having proved the existence of a written dissolution of a partnership, in 1854, called M. as a witness, to produce that paper. M. denied having it, and denied its existence. He then, on cross-examination, swore that the firm was dissolved in 1844 or 1845. *Held* that this was an affirmative and independent fact, and could not be upheld as a cross-examination; there being nothing to cross-examine about.

THIS is an appeal from a judgment entered upon the report of a referee in favor of the defendant. The action was originally against Jacob H. Mott as a co-defendant, but he died prior to the report of the referee, and the suit has since been continued against Garret S. Mott alone. The plaintiff claims to recover \$97,254.90 of alleged overdrafts, drawn upon and paid by it to the defendant, through his agent, J. H. Mott. On the 11th September, 1845, the defendant executed under his seal, and delivered to J. H. Mott, a power of attorney whereby he authorized him to collect and receive all moneys due the defendant from any one "and to indorse any notes or drafts in my favor, and to attend to any and all business in which I am interested or concerned, and to draw or indorse checks for me, and in my name;" giving him full power in the premises, as if he (the defendant) were personally present; which power of attorney was then lodged with the bank, where it has since remained. It appeared on the trial, that from 1849 to January, 1853, inclusive, the amount claimed was overdrawn from the bank on

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checks drawn by J. H. Mott and signed in the name of the defendant, with "J. H. Mott, attorney," written thereunder. It was also claimed that the defendant had himself over-drawn to the amount of \$2004, and that in any event the plaintiff was entitled to recover that sum and interest, and that the referee erred in not finding that fact. It also appeared that these over-drafts were accomplished by fraudulent collusion with one Brotherson, a book-keeper of the plaintiff, in the bank, who entered in the books of the plaintiff false credits to the defendant. The deposits were generally made and the checks usually drawn by the agent. The referee found that the defendant did not authorize the over-drafts, had no knowledge or notice of them, and that no part of the proceeds was received by him or to his use.

S. A. Foot, for the plaintiffs and appellants.

D. D. Field, for the respondent.

By the Court, PECKHAM, J. The agent here was empowered to collect the money due the principal, and to draw or indorse his checks. Did this authorize him to over-draw ?

A check is defined to be "a written order or request to a bank by a party having money there, to pay, on presentment, to another, or to him or bearer, or to him or order, a certain sum of money specified in the instrument." (*Story on Promissory Notes*, § 487.) "They are always supposed to be drawn upon a previous deposit of funds, and are an absolute appropriation of so much money in the hands of the bank or bankers, to the holder of the check. (*Same*, § 489.) The purpose of this power of attorney seems to be to give the agent power to collect the debts of the defendant, and also to draw out his money from the bank ; and the power authorized the bank to pay out the defendant's money on such checks, and stated that they would be regarded by the

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defendant as good vouchers for his money so paid out by the plaintiff. But it does not seem to me to give any intimation that the defendant thereby authorized the agent to overdraw. Borrowing money from the plaintiff by such checks does not appear to be a purpose of the defendant. It was an authorized draft upon his money, not upon his credit. A bank ought to know whether it has funds to meet a check. It usually does know ; and to allow an agent under such a power to over-draw, without limit, at the hazard and risk of the principal, would greatly tend to facilitate frauds ; would rather hold out a temptation to an agent. An authority to an agent to sign checks is best interpreted by confining its use to the legitimate purpose (as between the bank and the principal) for which the law presumes checks to be drawn, viz: to draw out the money of the principal. This doctrine, of course, has no application if the money so drawn was paid to the principal ; or if the act were in any manner ratified by him. The case at bar does not, perhaps, necessarily involve the question whether the power authorized the agent to overdraw. In fact, the plaintiff never intended to allow an over-draft. The bank never, in fact, trusted the defendant, never assumed to advance money on these checks beyond the amount standing to the defendant's credit. It assumed to pay them from the funds of the defendant. It was misled and deceived by the fraudulent and false entries of its own book-keeper. This book-keeper was, as to the entries in the books, the agent of the bank—its clerk and servant. If these fraudulent entries had not been made, the checks would not have been paid. The loss then is occasioned by the fraud of an agent, clerk and servant of the bank ; by the fraud of a clerk in regard to his legitimate business, in his appropriate department in the bank, and therefore obligatory on the bank, so far as respects innocent third persons. In judgment of law, therefore, the act of the clerk in this respect was the act of

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the bank. (*See Washington Bank v. Lewis*, 22 Pick. 24 ; *Foster v. Essex Bank*, 17 Mass. R. 479.)

If the defendant never had any knowledge of these frauds—never partook of their proceeds or profits—it would be unjust to charge him with this loss of the bank, when it was caused by the bank's own wrong. The agent of the defendant to draw checks was not his agent to commit or participate in these frauds. The bank must look for redress to its book-keeper and his sureties, if he gave any, and to those who participated in the frauds.

The plaintiff sought to show that the defendant had received the proceeds, or a part of the proceeds, of these overdrafts—sought to show that he was a member of the firm of Mott Brother, or Mott Brothers, where a large portion of the proceeds seems to have gone when they were received from the bank, but the referee found against him on both points, and there is a good deal of evidence to sustain that finding ; too much to warrant this court, on appeal, to reverse the judgment on that ground—though it cannot be denied that the fact of copartnership is not free from doubt, on the evidence.

The referee did not find in terms that the plaintiff paid the several notes and checks mentioned in its first and second requests to the referee to find ; nor, if paid, whether there were any funds in the hands of the defendant when they or any of them were paid. The evidence, I think, clearly shows they were paid. I assume that they were paid by the bank. Then the case shows that the defendant had funds to meet them at the bank. I have not gone over the figures in the case as to each item, but the defendant's counsel in his brief on this point has done so, and shows that result, and the plaintiff's counsel in reply thereto has failed to detect or exhibit any error therein. It was quite proper and pertinent that the referee should have found the facts as to those requests. They should have been substantially found, and had the plaintiffs' counsel insisted upon it, I think the court would

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have required a more particular finding. But if on a review in this court the evidence sustains the general finding of the referee, I do not think the court is required by any principle or sound rule of practice to reverse the judgment for such cause, though it perhaps may do so, or what is more appropriate, suspend the cause until the referee finds and reports the fact. This course was not unfrequently adopted in the old supreme court, and has been occasionally adopted in this court, and is in my judgment more appropriate and far less expensive to the parties. I see no objection to this practice under the code. Though the case now comes here on appeal in form from a judgment, yet it is all in the same court, and the motion is now made after instead of before judgment, as formerly. Besides, neither party gains any thing by reversing a judgment on such a ground, except the trouble and expense of trying it again. The referee in this case has found as a fact, the general result that the defendant did not overdraw his account and is not indebted to the plaintiff. I think it quite clear that the referee was right in not requiring an answer from the witness Glassey to the question "by whose instructions the answer of M. H. Mott was prepared." If it had any pertinency it called directly for the disclosure of matters communicated to him professionally; also in rejecting the record in a suit between other parties; also in excluding business directories of the city as evidence of a partnership of the defendant with Mott Brothers. The evidence for such a purpose is not much above mere rumor. The decision of the referee in refusing to strike out the evidence of M. H. Mott as to the sale from the defendant to himself of the interest in the firm of Mott Brothers is very questionable, and I think erroneous. The sale, he said, was in writing; and then, on further cross-examination, that it consisted simply of an account of stock taken, "and a receipt for what they paid for the stock." It has been held, I think on doubtful grounds, that you may give oral evidence of the contents of a mere receipt, without producing it. But taking

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all the evidence of this witness together, it is quite clear that this paper was a bill of sale, as well as a receipt. To speak most favorably for the defendant, on the testimony of this witness, the real contents of that paper were left in just that doubtful condition that required its production to present the clear truth; a proper illustration too of the force and propriety of the rule that requires the production of the best evidence. The decision cannot be sustained upon the ground assumed here by the defendant's counsel, that it was a cross-examination as to a matter introduced by the opposite party. The plaintiff had proved by Metcalf the existence of a written dissolution of the firm of Mott Brothers, somewhere in 1854, (signed by the defendant and others,) which at that time, as he said, consisted of the defendant, with others; but he had not possession of that paper. The witness Mott was called to produce that paper. He denied having it, and denied its existence, and then on cross-examination swore that the firm was dissolved in 1844 or 1845. This was an affirmative and independent fact, and cannot be upheld as a cross-examination. There was nothing to cross-examine about. The witness had expressly denied having the paper he was called upon to produce, and positively denied that such a paper ever existed. There was no pretense for a cross-examination in such a case.

A decision upon this point the other way would not probably have affected the result of the trial; still the question touched the part of the case chiefly litigated before the referee, and as to which there was a good deal of evidence on both sides, and it was finally left not free from doubt. In such a case I do not think the court can properly say that this evidence was harmless. The judgment should be reversed and a new trial ordered.

[NEW YORK GENERAL TERM, February 2, 1863. *Ingraham, Leonard and Peckham*, Justices.]

HART vs. KENNEDY and others.

Although the commissioners of the metropolitan police may have power, by rules and regulations adopted in pursuance of section 27 of the act of April 10, 1860, amending the metropolitan police act, to provide that certain officers in their employ shall "be deemed always on duty," yet no such regulation can alter the meaning of the 34th section of the same act, which declares that no person holding office under that act shall be liable to arrest on civil process, or to service of subpœnas from civil courts, "*whilst actually on duty.*"

Though they may be *deemed* to be on duty, yet if they are not *actually* on duty, the officers are liable to arrest, and to be served with subpœnas.

The 34th section of the act of 1860, by declaring that no officer shall be liable to arrest &c. whilst actually on duty, plainly implies that they shall be liable to arrest whilst *not* actually on duty; and that no officer shall be deemed to be actually on duty at all times and under all circumstances, so as never to be liable to arrest.

APPEAL by the plaintiff from an order made at a special term, vacating and discharging an order of arrest, as to the defendants Kennedy and Davis and modifying it as to the other defendant, Smith.

SUTHERLAND, P. J. This is an action for two several alleged illegal arrests and false imprisonments of the plaintiff by the defendants. The defendant Kennedy is the superintendent, the defendant Davis a captain, and the defendant Smith a patrolman, of the metropolitan police. An order of arrest was granted by a justice of this court, holding the defendants to bail, each in the sum of \$1000. This order of arrest was, on motion of the defendants, by an order made at a special term, vacated and discharged, as to the defendants Kennedy and Davis, and modified as to the defendant Smith by reducing the amount of bail required of him to \$250.

I infer from the papers that neither of the defendants had been arrested, when the order vacating and modifying the order of arrest was made; that the return day of the order of arrest as originally granted had been extended by an order, for the purpose of enabling the defendants to make the

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motion to vacate the order, before the defendants should be arrested.

By the 27th section of the act passed April 10th, 1860, to amend the metropolitan police act, passed April 15, 1857, the commissioners of the metropolitan police "in furtherance of the police government of the said metropolitan police district, and for the promoting and perfecting the police discipline of subordinates and of the members of the metropolitan police force, are empowered to enact, modify and repeal from time to time, rules and regulations of general discipline, wherein, in addition to such other provisions as may be deemed expedient by said commissioners, there shall be particularly defined, enumerated and distributed, the powers and duties of the superintendent of police force, and of the inspectors and captains of police force, &c.; *provided* that such rules or regulations shall not conflict with any of the provisions of this amended act, or with the constitution of the United States, or of this state."

By the 34th section of the same act it is declared that "no person holding office under this act shall be liable to military or jury duty, nor to arrest on civil process, or to service of subpoenas from civil courts *whilst actually on duty.*"

It appears from the affidavit of the defendant Kennedy, in this case, that under section 27 of said act the commissioners of the metropolitan police enacted or passed certain rules and regulations of general discipline, and that by section 60 of said rules it was provided that the superintendent, inspectors, captains and sergeants of police will be *deemed to be always on duty.*

It appears from the opinion of the learned justice who made the order at special term, vacating and modifying the order of arrest in this case, and it was conceded on the argument before us, that the order of arrest was vacated and discharged, as to the defendants Kennedy and Davis, on the ground that the one was the superintendent, and the other a

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captain, of the metropolitan police, when the alleged arrests and false imprisonments of which the plaintiff complains took place; and that being such officers, by the 34th section of the act and the 60th section of the rules and regulations enacted or passed by the commissioners, under the 27th section of the act, they were as such officers free from arrest on civil process, at all times and under all circumstances. It is difficult to see upon what other theory the order vacating the order of arrest as to the defendants Kennedy and Davis, and modifying and retaining it as to the defendant Smith, could have been made. It is plain that it was an error to vacate and discharge the order as to the defendants Kennedy and Davis on this ground. The 34th section of the act, by declaring that no person holding office under the act shall be liable to arrest on civil process, or to service of subpœnas &c. *whilst actually on duty*, plainly impliedly declares that persons holding office under the act shall be liable to arrest on civil process, or to service of subpœnas &c. *whilst not actually on duty*. This section impliedly declares that no person holding office under the act shall be deemed to be actually on duty *at all times and under all circumstances*, so as never to be liable to arrest or service of subpœna whilst holding the office.

The police commissioners had no power, under the 27th section of the act, to enact any rule or regulation in conflict with the 34th section. The 27th section contains an express *proviso* to that effect; and independent of such proviso, they would have had no power to enact or pass a by-law or regulation inconsistent with an express provision of the act conferring on them their powers.

But I do not think the 60th section of the rules and regulations enacted by the commissioners was intended to interfere with the 34th section of the act. It was intended to be and is, a mere rule or matter relating to discipline, as *between the commissioners and those holding office under them*. It was not intended, and cannot be deemed, to affect, in any manner,

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the rights of third parties under the 34th section of the act, when persons holding office under the act are not actually on duty.

It would be an extraordinary thing to hold that the superintendent, or a captain, of the metropolitan police can *at no time* or under any circumstances, be served with a subpoena or compelled to appear and testify in a civil court; and yet the 34th section of the act places the same restriction on the right to subpoena as it does on the right to arrest.

The order made at special term should be reversed, so far as it vacated the order of arrest as to the defendants Kennedy and Davis. But I do not see why the other part of the order should not be affirmed.

INGRAHAM, J. I concur in reversing the order below as to Kennedy and Davis. The commissioners may have power by rules to provide that for reasons of their own, officers in their employ shall be deemed always on duty; but no such regulation can alter the meaning of the terms used in the statute "actually on duty." Though they may be *deemed* to be on duty, yet if they are not *actually* on duty the officers are liable to arrest and to be served with subpoenas. We must look at the object of the provision, to ascertain the intent of the legislator. That evidently was to prevent an arrest &c. while the officer was actually discharging his public duties, so as to prevent the possibility of arresting one of these officers while actually in the public employ. But when some other officer has temporarily taken his place, it cannot be said that he is actually on duty, although for police purposes they provide that he shall be deemed to be so.

The reduction of the bail by the justice at chambers was a matter of discretion, with which, under ordinary circumstances, we do not interfere.

CLERKE, J. The judge at special term gave no effect to the 60th section of the general rules adopted by the commis-

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sioners, declaring that the superintendent, inspectors, captains and sergeants shall "be deemed always on duty." It is emphatically denied in the opinion delivered at the special term, that any rule or regulation of the commissioners can interfere with the right of a court of justice to determine the fact according to the evidence. But it was contended that from the nature and extent of the duties of the superintendent and captains, the statement in the affidavit of Kennedy must be assumed as true, "that he has always since his appointment as superintendent of police been and ever is on duty as such superintendent, at all times of the day and night," and that "all the captains in his district are also on duty, at all times, day and night, without intermission." It was thought that this should be assumed, until the contrary be shown; so that, after this positive statement, the burthen of proof should devolve on the plaintiffs to show that, at the time of the arrest on civil process, the party arrested, if the superintendent or a captain, was engaged in some pursuit of business or pleasure not within the sphere of his public duties.

In the language of the opinion delivered below: "the patrolmen have certain intervals of remission from duty, fixed and known, during which they are not liable to duty; but this can scarcely be affirmed of the superintendent. No doubt he has certain hours for taking his meals and taking sleep; but as he has a general and unremitting supervision over the operations of the whole force; and as his directions and advice in a city like this, may be necessary at any time, he is liable to be called to active duty at any hour of the day or night; so that it is not at all unreasonable to say that he is always actually (though not actively) on duty." In such a case, to be prepared for duty is to be on duty. When, either in his office or in his house devising plans and thinking of instructions for the large force under his command; when he is awaiting applications for those instructions, ready to give them during every hour of the twenty-four, and when not thus engaged he is visiting the numerous stations in the city,

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I repeat, it is not at all unreasonable to acquiesce in his sworn statement, until the contrary be proved, that "he is at all times actually on duty." It would indeed be erroneous to hold that the superintendent or a captain of the police, cannot at any time or under any circumstances, be served with a subpoena or any other process. On a careful perusal of the opinion of the judge at special term, I cannot discover that he held any such thing. But he did hold that those endeavoring to compel a superintendent or captain to appear and testify, or those at whose suit he is arrested on civil process, should show that he was otherwise engaged than on duty, at the time of the service of the process; the clear presumption being, from the nature and extent of his duties and from his own sworn statement, that, like the sentinel in his sentry box, he is always actually on duty.

I think that a regard for the efficient government of the police force of this populous city and a desire for the public safety and comfort, render it expedient to establish this presumption in favor of the superintendent and captains; particularly when we consider that it is only raised in the case of a provisional remedy; the allowance of which, in any case, rests in a great measure in the sound discretion of the judge, who may refuse it altogether, if he thinks the arrest is not necessary to secure the presence of the defendant, to answer to the final judgment of the court. It is not at all probable that a public officer, having a position, and performing duties, like those of the superintendent of police, will not render himself amenable to any process which may be issued to enforce any judgment that may be rendered against him. Nevertheless, I am not in favor of affirming the order of the special term, as far as the superintendent and captains are concerned. No arrest of these persons was actually made. The motion was made to set aside the order of arrest. Therefore the plaintiff had no opportunity of having them arrested, when not on actual duty; so that the principles on which the de-

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cision of the special term is founded are not applicable to the present motion.

The order made at special term should be reversed, so far as it vacated the order of arrest, as to the defendants Kennedy and Davis; but should be affirmed as to the other defendants.

Judgment accordingly.

NEW YORK GENERAL TERM, February 2, 1863. *Sutherland, Ingraham and Clarke, Justices.*]

BUTTERWORTH, receiver &c., vs. O'BRIEN.

The claim for dividends improperly declared by an insolvent banking corporation belongs to creditors, and not to the receiver. The right of action is in them, and the receiver cannot collect such moneys for the benefit of stockholders.

Nor is it a cause of action that such dividends were paid to persons who were indebted to the bank.

Where, in an action by the receiver against the former president of a bank, the complaint alleged that the defendant used fictitious notes in lieu of money of the bank, which he fraudulently used and disposed of, and that such notes were among the assets of the bank; *Held* that these facts, if proven, would be sufficient to put the defendant on his defense; and that the claim was one which belonged to the receiver, and might be collected by him.

A PPEAL from a judgment entered upon the report of a referee. The material facts are stated in the opinion of the court.

INGRAHAM, P. J. This action is brought by the receiver of the Island City Bank against the defendant, who was president and a director, to recover from him for certain wrongful acts charged against him. The defendant answered to the complaint, denying all the allegations made against him. The case was referred, and the referee has dismissed the complaint as insufficient and containing no cause of action.

The referee was clearly right as to all the causes stated in the complaint except that contained in the 4th clause of the complaint. The claim for dividends improperly declared belongs to creditors and not to the receiver. The right of action is in them, and the receiver cannot collect such moneys for the benefit of stockholders. Nor was it a cause of action that such dividends were paid to persons who were indebted to the bank.

The allegation that the defendant parted with notes of the bank as security for loans made to him in the name of the bank, without an averment that any thing was due to the bank, or that the loans had not been paid, showed no cause of action against the defendant.

In the 4th clause of the complaint it is averred that the defendant used fictitious notes in lieu of money of the bank which was fraudulently used and disposed of by the defendant; that such notes were among the assets of the bank, and amounted to \$27,000. Under the ruling of the referee we must consider these allegations to be admitted, and then we have the following as facts: That the defendant put in the bank two notes signed by a fictitious drawer; that the notes were used by the defendant in lieu of so much money of the bank; that the money was fraudulently disposed of by the defendant; and that the notes are now among the assets of the bank. It appears to me that these facts, if proven, would be sufficient to put the defendant on his defense. The possession of the notes by the receiver is presumptive evidence that the moneys have not been repaid. If paid, the onus is on the defendant to show it. If the notes were the defendant's, there would be no doubt of sufficient facts to make out the plaintiff's case. If the notes were fictitious, quite as good a cause of action exists against him. The claim is also one which would belong to the receiver, and may be collected by him.

The complaint, as to this claim as well as to the others, is very loosely and informally drawn, and may subject the plaintiff to a motion to have it made more specific, but under the

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present system is not so bad as to be demurrable, so far as relates to this clause. In fact under the late decisions of the court of appeals we are not to pay any attention to forms, if we can find in the complaint any allegations which, under any view of them, may give the plaintiff a right to recover.

I think the referee erred in this respect, and that the judgment should be reversed and a new trial ordered; costs to abide the event.

CLERKE, J. concurred.

SUTHERLAND, J. I dissent. I think the judgment below should be affirmed. It does not belong to the plaintiff as *receiver* to correct or prosecute for the frauds and illegal acts complained of in the complaint. The other grounds stated in the opinion of the referee appear to me also to justify the dismissal of the complaint.

Judgment reversed and new trial ordered.

[NEW YORK GENERAL TERM, February 2, 1863. *Sutherland, Clerke and Ingraham*, Justices.]

REBECCA BARNETT vs. ESTHER LICHTENSTEIN.

A married woman can charge the whole, or a portion of her separate estate, as a surety for her husband, the intention to charge such separate estate being declared in the contract.

And, although the instrument by which she promises to pay the debt of her husband out of her separate estate declares that the consideration is for the benefit of her separate estate, instead of stating the real consideration, this will not vitiate the instrument or exempt the wife's separate estate, provided she expressly charges her separate estate in the instrument.

INGRAHAM, J. dissented.

THIS action was brought by the plaintiff, as indorsee, against the defendant, as maker of a promissory note payable to the order of M. Lichtenstein, and indorsed by

him. The complaint charged that the defendant had received, to the use of the plaintiff, \$152.17; that she was the owner of separate property, consisting of a house, No. 209 West 48th street, in the city of New York, and other real and personal property, of great value; that being so indebted, and owning this property, she made the promissory note in question, the payee being her husband; and that she delivered the note to the payee, who indorsed and delivered it to the plaintiff. Upon the trial there was conflicting testimony as to the consideration of the note. The court found that it was given for the liability of the husband, and as his surety, and that the defendant voluntarily signed the note, with the understanding and charge therein expressed; but that she was not liable thereon. Judgment being given at the special term, in favor of the defendant, for costs, the plaintiff appealed.

C. A. Nichols, for the appellant. I. The conclusion of law upon the facts is erroneous, because it is competent for a married woman to charge her separate estate with a debt contracted as surety. (*Story's Eq. Jur.* §§ 1396, 1399. *Stuart v. Kirkwall*, 3 *Mad.* 387. *Greatby v. Noble*, *Id.* 94, *Yale v. Dederer*, 18 *N. Y. Rep.* 265, and 22 *id.* 450.) The decision in the latter case was, that the mere giving a promissory note in the ordinary form, only importing on its face a personal contract, by a married woman, was not, of itself, sufficient evidence of an intention to charge her separate estate. "Where her intention to create such a charge has not been expressed, and there is no direct evidence of such intention, the mere fact that the creditor is able to present a note or other obligation, bearing her signature, ought not to be regarded as sufficient evidence to justify the inference that it was her voluntary intention to charge the payment of the debt upon her own separate property." (*Opinion of Harris, J.*)

II. The power of a married woman to charge her sepa-

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rate estate, is determined by the well settled rules in equity. The case of *Yale v. Dederer* decides nothing as to the extent of this power, (otherwise than as it sanctions these rules.) It only decides as to the mode in which it is to be exercised. "My conclusion is that, although the legal disability to contract remains at common law, a married woman may, as incidental to the perfect right of property and power of disposition which she takes under the statute, charge her estate for the purposes, and to the extent which the rule in equity has heretofore sanctioned in reference to separate estates." (*Opinion of Comstock, J.*)

III. The powers of a married woman over her separate estate includes the right to charge it with, and make it liable for her husband's debts. (*Story's Eq. Jur.* § 1396. *Demarest v. Wyknoop*, 3 *John. Ch. R.* 144. *Fido v. Soule*, 4 *Russ. R.* 112.) And the power must be exercised, in this state, through some instrument, expressly stating her intention to charge it. (*Yale v. Dederer, sup.* *Arnold v. Ringold*, 16 *How. Pr. R.* 158.) "All agree that, when the wife has expressly charged the payment of a debt upon her separate estate, whether it be her own debt or the debt of another, such charge is valid, and will be enforced." (*Opinion of Selden, J.*) The reasons assigned by the court below are, *First*. That the wife is not concluded in her statement contained in the note, as to its consideration. As to which, it may be conceded for the purpose of the argument, and it is so far admitted, that it is only a contract of suretiship, in which for the consideration of extension of time, she has charged the payment of another's debt upon her own estate. *Second*. That it is not valid as a personal contract of a feme covert. As to which, there is no claim that it has any validity as a personal contract. All authorities are agreed that a married woman can make no valid personal contract. All are equally agreed that a married woman can contract to bind her estate. *Third*. That it is void as a charge upon her separate estate, because the particular estate

is not described, and because her husband has not given his assent, pursuant to the statute of 1860. As to which — No case can be found which holds that the only way in which a married woman may charge her separate estate is by giving a specific lien upon particular property. As to the statute of 1860, it is not a disabling, but an enabling act, and provides that a married woman may convey and contract, (meaning contracts for conveyances,) with the assent of her husband, in writing. If this is a case calling for such assent, it has been given in the most direct and unmistakable manner, viz: by her written undertaking to pay to the order of her husband, out of her separate real and personal estate, and by the written guaranty of her husband thereon, who, by his indorsement, certifies that the undertaking of the wife is a valid one, and that he is responsible for its performance.

H. D. Lapaugh and *Richard Oatis*, for the respondent.

I. The separate estate of defendant, which was sought to be charged by the plaintiff for her claim, was evidently not a trust estate. The complainant alleges "that the defendant had and owned, as her separate property and estate, a house," &c. "known as No. 207 West 48th street," in said city, and also other real and personal property of great value. This is the usual allegation when the wife is seized of property of her own, not under a marriage contract or trust, and which was not denied by the defendant's answer.

II. No proof was shown on the trial that the marriage of the respondent took place after the enabling acts of 1848 and 1849; consequently those statutes would not invest the respondent with any power over her personal estate. (*Holmes v. Holmes*, 4 Barb. R. 295. *White v. White*, 5 id. 474. *Westervelt v. Gregg*, 2 Kern. 202.)

III. Even were it conceded that the enabling acts of 1848 and 1849 gave the power of disposition to the respondent of her realty and personalty, yet they gave no power to her to make contracts or enter into bargains binding her in any

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shape or form whatever. (*Gates v. Brower*, 5 *Seld.* 205. *Vansteenburgh v. Hoffman*, 15 *Barb.* 28. *Switzer v. Valentine*, 4 *Duer*, 96. *Yale v. Dederer*, 22 *N. Y. Rep.* 450.)

IV. All these matters remained as they were at common law, until the act of 1860, (*Laws of 1860*, p. 157,) which for the first time gave married women authority to act as sole traders, except in cases specified at common law. She could not before, and cannot since the act of 1860, make any contracts binding her personally, and therefore as the act of a *feme covert* the note is void.

V. Where a married woman owns real estate, the title of which is vested in her, the only way she can charge it is by a deed or mortgage acknowledged by her before a commissioner of deeds separate and apart from her husband; and she must state that it was done through no fear or compulsion of her husband. Yet the claim for judgment in this action is that any and all of the real and personal estate of the defendant may, by the order of this court, be directed to be sold, and the proceeds thereof applied to the payment of the amount due, this being a judicial disposition of her estate on her mere contract. (*Knowles v. McCamly*, 10 *Paige*, 342. *Ackert v. Pultz*, 7 *Barb.* 386. *Owen v. Cawley*, 36 *id.* 52.)

VI. The proof is that the debt constituting the consideration of the note, was the debt of the husband of the defendant, and so the justice found. This being the case, and the note being made to the order of the husband, the wife (defendant) undertook to become his surety, which she could not do.

VII. The recital in the note cannot estop the respondent, for several reasons. (1.) A wife cannot estop herself by a contract which is void. (2.) The appellant did not act upon the strength of and relying on the declarations. (3.) The appellant was as well informed as to the origin and consideration of the debt as was the defendant.

VIII. The separate estate of the respondent cannot be charged under any of the provisions of the act of 1860, be-

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cause the obligation declared on grew out of a voluntary undertaking on her part to pay the debt of her husband, and not out of any contract relating to any trade or business which that act permits her to conduct independent of her husband. In short, the debt under the act of 1860, must be one that the husband cannot be held for. (*Barton v. Beer*, 35 *Barb.* 78.)

IX. As a contract undertaking and purporting to create a charge upon her separate estate, it is void. (1.) The estate and property intended to be charged is not specifically described, and the contract is uncertain. A specific lien is not created on any particular property. (2.) The assent of the husband is not given in pursuance of the act of 1860. (*Laws of 1860*, p. 157.)

CLERKE, J. The special term has found that the note in question was not made or procured under the coercion of the defendant's husband or any other person, and that the same was made at the request of her husband, for his benefit and as his surety. The note is in these words: "Thirty days after date I promise to pay to the order of M. Lichtenstein [her husband] one hundred and fifty-two dollars seventeen cents, at 359 Canal-street, value received, *for the benefit of my separate real and personal estate*, and the said sum is hereby declared to be a charge thereupon and payable therefrom." It is alleged in the complaint that the defendant had separate real and personal estate, and this is not denied in the answer

I do not agree with the justice at special term, that the estate intended to be charged should be specifically described. By the terms of the contract the wife's whole separate estate is charged; it is not necessary to specify the property, unless she intended to charge only a specific portion of it. It cannot be denied that a married woman can charge the whole or a portion of her separate estate as a surety for her husband. Of course, the intention to charge her separate estate must

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be declared in the very contract which is the foundation of the charge. In the present case this intention is distinctly declared in the contract upon which this action is founded. The contract, however, declares that the consideration was for the benefit of her separate estate; instead of which, it is found by the justice to have been given to secure the payment of the existing indebtedness of her husband, for the amount of the note. In other words, she signed the note as surety for her husband. The only question then is, can her separate estate be exempt from liability, because the contract, although it charges her separate estate, does not state the real consideration? Suppose the words "for the benefit of my real and personal estate" were omitted in the note, leaving the words "value received" and the words charging her separate estate; would not the plaintiff be entitled to recover? These words do not vitiate the note. She acknowledges that value was received, and it is proved that she signed the note as surety for her husband;—a consideration which the law recognizes as sufficient to bind her separate estate. A mistake in describing the particular consideration does not avoid any contract, provided a valid consideration existed, which was the real foundation of the contract. I admit a wife cannot estop herself by a contract which is void; but it is a mistake, I think, to say that a misstatement of the consideration makes it void. The act of 1860 is not applicable to a charge on the separate estate of a wife; and if it was, the husband's consent is satisfactorily shown, when it appears the note was given for his benefit, and was indorsed and transferred by him.

The judgment should be reversed and a new trial ordered; costs to abide the event.

SUTHERLAND, J. concurred.

INGRAHAM, J. (dissenting.) I do not concur in the views expressed by my brethren in this case. I understand them as considering that the note on which this action was brought

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was not for any benefit to the separate estate of the wife, but as given as security for the debt of her husband. The note was made payable to the husband and indorsed by him to his creditor.

1. I am of opinion the wife cannot loan her note to her husband for his benefit without any consideration to herself, to be used by him as security for his debts, even although she makes it a charge upon her separate property. 2. Nor can she charge her separate estate for any such indebtedness, by the mere words included in the note declaring that the indebtedness is such a charge. I concede that a wife may bind her separate property so as to be such security; but it must be, as to real estate, in a form that will reach real estate. She may join with her husband in a mortgage of her real estate for money advanced to him; or she may make any specific piece of property liable to such a charge by executing an instrument which, at the time, imposes such a liability. But the general declaration contained in this note, is not, in my judgment, sufficient to impose on all her estate, real and personal, a liability which, at law, is void and cannot be enforced, and which, therefore, presents to equity no good reason why a court of equity should interpose its power to enforce a contract which is void at law. The effect of such an interference is to place a married woman in a worse condition than if she were sole—to put her more completely in the power of her husband, than she would be under any other relatives, and to deprive her of all the safeguards which the law has thrown around her to preserve to her own use from the debts and liabilities of her husband, the property which is hers and not her husband's. I concur fully with Comstock, J. in *Yale v. Dederer*, (18 N. Y. Rep. 265, 276,) when he says: "The principle on which the liability depends cannot be extended to cases of mere suretiship for the husband or a stranger. The obligation of a surety is held to be *stricti juris*, and if his contract is void at law, there is no liability in equity founded on the consideration between the principal parties.

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**** If the promise is on her own account, if she or her separate estate received a benefit, equity will lay hold of those circumstances and compel her property to respond to the engagement. Where these grounds do not exist there is no principle on which her estate could be made answerable. *** Courts of equity, proceeding *in rem*, will take hold of her estate and appropriate it to the payment of her debts. But when her obligation is one of suretiship merely, she owes no debt at law or in equity. If not at law, which is very clear, then quite as clearly, not in equity."

The acts of 1848 and subsequent ones, as to married women, give no greater validity to contracts of suretiship by married women than they possessed previous to the passage of those statutes. I know of no case where a liability of a wife as surety for her husband has ever been enforced against the wife, except where she has made such liability against herself by an express incumbrance upon some specific property. If her mere declaration in a note that she intends thereby to bind her separate estate, is sufficient to create a valid obligation when it is utterly void without it, she is placed by equity in a much worse condition than the husband. I am not disposed to deprive the wife of the few safeguards that are left to her as to her separate estate, to protect it from an extravagant and imprudent husband, by extending the liability of the wife in such cases any further than they existed under the old system; unless the new statutes clearly impose such liability. As they do not reach this case, I see no reason for interfering with the judgment appealed from.

New trial granted.

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BRADFORD and others *vs.* Fox.

A creditor who has received from his debtor a check upon a bank, cannot return the same to the drawer, and sue on the original cause of action, without having first demanded payment. CLERKE, J. dissented.

Presenting a check to the bank, to be certified, is not equivalent to a demand of payment; and the refusal of the bank to certify it will not excuse the holder from presenting it for payment.

APPEAL by the plaintiffs from a judgment entered at a special term, in an action for goods, wares and merchandise sold to the defendant by the plaintiffs.

INGRAHAM, J. The plaintiffs sold the defendant a bill of goods, for which they received the defendant's check and gave a receipt, on the bill. The check was sent to the bank, with a request to certify the same, which was refused, and the check returned. No demand of payment was made. On the return of the check notice was given to the defendant and the present action brought on the original cause of action. On the trial the plaintiffs produced the check and offered to cancel it. The court held that payment of the check should have been demanded, and rendered judgment for the defendant. The plaintiffs appeal from this judgment.

There can be no doubt that merely receiving the check was no payment of the original indebtedness, if it was not paid; unless specially agreed to be received as such payment. And if payment had been demanded and refused, there can be no doubt of the right of the plaintiffs to resort to the original cause of action and surrender the check upon the trial. (*Taylor v. Allen*, 36 Barb. 294) The only questions, therefore, that arise in this case are: 1st. Whether presenting the check to be certified is equivalent to a demand of payment; and 2d. If it is not, whether a creditor who has received a check may return the same to the party and sue on the original cause of action, without making such demand.

Presenting a check to be certified is not demanding payment. The bank was under no obligation to certify the

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check, or to accept it. The instrument did not require acceptance, but payment; and the duty of the holder was not discharged until he demanded payment. This he could not do in this case, because the check was payable to the order of the plaintiffs, and was not indorsed by them.

A request to the bank to do to the check something which they were under no obligation to the holder or drawer to do, can never be considered equivalent to a demand for payment, which, under the duty they owed to the drawer, they were bound to make, if he had funds in the bank. For a refusal to pay, under such circumstances, the drawer would have a right of action against the bank, but not for a refusal to certify.

Were the plaintiffs, then, under any obligation to present the check to the bank? It was not received in payment. They held the check as agents of the defendant, to draw the money from the bank and apply it to the payment of his indebtedness to them. The indebtedness was not discharged until the check was paid. In *Cromwell v. Lovett*, (1 *Hall*, 56,) Oakley, J. says: "If they (the holders) were not guilty of any negligence in the transaction whereby the defendant has sustained an injury, they may return or cancel the check and sue upon the original consideration."

The check is drawn upon moneys in the bank, belonging to the defendant. If not paid, the money still remains in the bank, the property of the defendant. He can at any time control it, and has sustained no loss by its remaining to his credit; unless the bank upon which it was drawn, has failed. In the present case no proof was furnished by either party, as to the consequences of such neglect to demand payment.

The burthen of showing that no injury had accrued from the neglect to demand payment rested upon the holder before he could return the check at the trial and recover for the original indebtedness. This was held in *Little v. Phoenix Bank*, (2 *Hill*, 425,) and affirmed in the court of errors,

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(7 *Hill*, 359,) viz: that delay to present the check would not have the effect to discharge the drawer, if he had not suffered loss as a consequence. This, however, to be shown by the holder, in the first instance.

The same rule should be applied to this case. The plaintiffs received a check from the defendant for the bill of goods, which they should have presented for payment. Not having done so, they must show that no injury resulted to the defendant from such neglect, before they can sue on the original indebtedness and cancel the check, upon the trial.

As the plaintiffs have not brought themselves within this rule, the judgment appealed from was correct and should be affirmed.

SUTHERLAND, P. J. concurred.

CLERKE, J. (dissenting.) A creditor, who receives a check from his debtor, receives it in payment of his demand, or does not receive it in payment of his demand. If he receives it expressly in payment of his demand, he can look alone to the check, and in his action must prove all that the law requires—such as demand of payment, &c.—to entitle him to a recovery on the check. The burthen of proving demand and non-payment, &c. devolves upon him. But where the check is not received in payment of the demand, but as a method convenient to both parties for making payment, the creditor can return the check, at any time, and resort to his action on the original demand; and, having this right, he is under no obligation, in the first instance, of proving presentation for payment, or any of those preliminaries which are necessary to entitle him to a recovery on the check alone. To be sure, he is liable for any damage which has accrued in consequence of his neglect in not presenting the check for payment, at the bank. But the burthen of proof, in the action on the original demand, devolves upon the defendant. The case in the 2d and 7th of *Hill*, referred to by Judge

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Ingraham, was an action on the bill. On this the plaintiff relied for a recovery; and, of course, the burthen of proof was on him to show that the defendant had sustained no damage by the delay in not presenting it for payment in due time.

In this case, I think it was the duty of the defendant to show that he was damnified by the plaintiffs' omission to present the check for payment, at the bank, and that it was not necessary for the plaintiff to prove that he had demanded payment of it.

I am in favor of reversal.

Judgment affirmed.

[NEW YORK GENERAL TERM, February 2, 1863, *Sutherland, Ingraham and Clerke*, Justices.]

 SKINNER and others vs. STUART and others.

At common law, when personal tangible property of a debtor has been levied upon, by virtue of an execution or attachment, it is in the custody of the law, whose minister, the sheriff, is the proper person to bring actions to recover the possession or value thereof. The plaintiff cannot sue therefor. Section 232 of the code does not authorize the plaintiff in an attachment suit to commence an action to take possession of the tangible property levied on, or to take legal proceedings to collect or receive into his possession debts, credits and effects of the defendant.

The only provision in the code, or in any other statute, which authorizes any proceeding directly by the plaintiff, is contained in section 238 of the code. And a plaintiff in an attachment suit cannot commence an action under that section, without first executing to the sheriff the *undertaking* therein mentioned.

The remedies afforded to plaintiffs by the chapter of the code relating to attachments are not merely cumulative. They are the only remedies known to the law in such cases.

A complaint, in an action by attaching creditors, alleging that the defendants have a large amount of personal property, consisting of money, bills, notes and other evidences of debt, &c. deposited with them by, and belonging to, the defendants in the attachment suit, without showing any fraud, collusion or combination obstructing the ordinary processes of the law, or

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alleging that those processes have been exhausted, or even resorted to, or that the lien cannot be enforced without the intervention of the court in the exercise of its equitable powers, does not state a sufficient cause of action to sustain a suit demanding the intervention of the court by the exercise of its equitable or extraordinary powers.

The only remedy, in such a case, is under section 238 of the code; its conditions being first complied with.

THE plaintiffs, and all of the defendants except George H. Stuart and Company and S. B. Chittenden, are attaching creditors of the firm of Shepherd & Moore, non-resident debtors. The attachments were all in the hands of the sheriff of the city and county of New York at the time of the commencement of this action, and now remain there. The defendants George H. Stuart & Company had and have in their possession large amounts of money and property levied upon by such attachments, but refused to deliver the same to the sheriff under the attachments. The defendant Chittenden became the assignee or purchaser of all the interests of Shepherd & Moore in said money and property, subsequent to such attachments. The defendants Peet, Hughes & Peet issued the first attachment, but as against the other attaching defendants and plaintiffs were not entitled to claim priority, as their action was commenced before their cause of action matured.

The relief demanded is, that the defendants who have the property, and have been directed to deliver it to the sheriff, may be again directed to deliver it to the sheriff, and that the claims of the attachment creditors, which are being adjudicated, may be again adjudicated. The defendants Stuart & Company, Linder & Kinsley, and Butterfield & Jacobus demurred separately, but all specified the same grounds of demurrer, which are almost a literal copy of the grounds of demurrer named in section 144 of the code. The defendant Jewett, after the general demurrer, alleged specially: 1st. That the cause of action was vested in the sheriff, in whose name the action should have been brought. 2d. That Shepherd & Moore and the sheriff should have been made parties

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defendant, and that there was otherwise a defect of parties defendant. 3d. That the sheriff should have been made plaintiff, and if not, then the defendants other than Stuart & Company, Chittenden, and Peet, Hughes & Peet, ought to have been made plaintiffs, unless they refused to join, and that there was otherwise a defect of parties plaintiff. 4th. That there was an improper uniting of causes of action in respect of the cause of action against Peets & Hughes not being properly connected with that against Stuart & Company. The defendants Peets & Hughes demurred, and insisted 1st. That several causes of action had been improperly joined ; 2d. That there was no cause of action ; and 3d. That the sheriff ought to be made defendant.

The court, at special term, overruled the demurrers to the complaint, and the defendants who had demurred thereupon appealed to the general term.

By the Court, CLERKE, J. I. At common law, when personal tangible property was levied upon, under an execution, it forthwith vested in the sheriff: the plaintiff in the execution could not meddle with it. If it was converted, or concealed or taken away, none but the sheriff could retake it, or by action recover it or the value of it. The property, when once levied upon, was in the custody of the law, and its minister, the sheriff, was bound to preserve it against all the world for the purpose of satisfying the judgment. To him alone could the plaintiff look for the application of the property to this purpose. The law now allows a provisional remedy in certain cases, to secure the application of property to the satisfaction of an alleged debt, immediately after the commencement of an action, and, of course, before the claim is established. By this provisional remedy a warrant of attachment is issued ; if it is tangible personal property, the sheriff shall keep the property seized by him ; and all debts, credits, and effects of the defendant he shall collect and receive into his possession. He may take such legal proceedings,

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either in his own name or in the name of the defendant, as may be necessary for that purpose. (§ 233 of the Code.) This section certainly does not authorize the plaintiff in the action in which the attachment is issued, to commence an action to take possession of the tangible property levied upon, or to take legal proceedings to collect or receive into his possession debts, credits and effects of the defendant. He is under precisely the same disability in that respect, in which a plaintiff in an execution was placed before the legislature gave the right to this provisional remedy. He can no more meddle with or claim possession of the property under it, than he could at any time under an execution. The property is, in the same manner, in the custody of the law; and he can only look to the sheriff, who is responsible to him for its application to any judgment which he may recover. The only provision in the code, or in any statute, which admits of any proceeding directly by the plaintiff, is contained in § 238; which says that the actions authorized in the chapter to be brought by the sheriff, may be prosecuted by the plaintiff or under his direction, *upon the delivery by him to the sheriff of an undertaking executed by two sufficient sureties, &c.* So that by complying with the conditions of this section the plaintiff may, undoubtedly, prosecute in his own name, any action which the sheriff could have prosecuted; that is, if there are debts, credits and effects, he may in his own name take such legal proceedings as may be necessary to collect and receive them into his possession. If it is a promissory note belonging to the defendant, he may sue the parties liable on the note, in his own name, or he may sue any debtor of the defendant, or any person who, like the defendant Stuart in this action, has money, bills, notes or other evidences of debt or other property belonging to the defendant in the attachment. But certainly he cannot do this, under the provisions of the code, without complying with the conditions which it prescribes. It is nowhere alleged in the complaint that the plaintiff executed an undertaking to the sheriff; and

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as he has no such right at common law, he must strictly comply with the terms upon which the statute gives him this new right. As I have already shown, he has no more this right at common law, or by any previous statute, than he had to commence such a suit to collect and receive into his possession debts, credits and effects of the defendant under an execution, before the provisional remedy was authorized by law.

II. But even if he did comply with the conditions prescribed by the code, could an action of this kind be maintained? This is an action requiring the equitable interposition of the court, seeking its extraordinary instead of its ordinary remedies. The complaint sets forth that the defendants Stuart & Company have a large amount of personal property, consisting of money, bills, notes and other evidences of debt and property deposited with them by and belonging to Shepherd and Moore, the defendants in the attachment suit. It shows no fraud, collusion or combination obstructing the ordinary processes of the law; it does not show that these processes have been exhausted. Indeed, it does not show that they have ever been resorted to; for they could not have been resorted to without first bringing a common law action. There is nothing stated in the complaint, as is erroneously supposed by the court below, to show that the lien cannot be enforced without the intervention of the court in the exercise of its equitable powers. If the defendants Stewart & Company withhold the statement required of them by the code, a summary method is provided by which they can be compelled to furnish that statement; and if they refuse to deliver the property to the sheriff, the remedy afforded by an ordinary action will be ample for the plaintiffs, if they think proper to resort to it, by first complying with the conditions which the code prescribes.

It is, in my opinion, a great mistake to say that the remedies afforded by the chapter of the code relating to attachments are merely cumulative. They are the only remedies

known to the law in such cases. When a lien was obtained on personal property under a judgment, previous to the enactment of the code, no one but the sheriff could have enforced the lien by virtue of the execution. As I have shown, when the property was levied upon it vested in him, and he was responsible to the plaintiff for the faithful performance of his duties. The sheriff alone could sue for its recovery when converted, concealed or taken away. Where, indeed, the execution was returned unsatisfied, the plaintiff was entitled to his creditor's bill; or when an execution was issued and the enforcement of the execution was obstructed by fraud, collusion or combination, the extraordinary aid of a court of equity would be afforded to remove the obstruction. But this case does not fall within either of these classes of equitable remedies. Neither will the pretense of settling priorities among the attaching creditors warrant the court in assuming extraordinary jurisdiction. If the sheriff sued had received possession of the property, he would satisfy the attaching creditors in the order of their priority. If any attaching creditor commences an action under section 238 of the code, and, as in this case, prays to have the property delivered to the sheriff, that officer will do precisely the same as if the action was prosecuted in his own name.

The complaint cannot be sustained: 1st. Because the plaintiffs have not complied with the conditions of the section of the code (§ 238) which authorizes the plaintiff to commence an action; and 2d. If they did comply with it, the complaint does not state a sufficient cause to sustain an action of this nature.

There should be judgment for the defendants on the demurrer, with costs.

[NEW YORK GENERAL TERM, February 2, 1863. *Sutherland, Ingraham and Clerke*, Justices.]

**THE NIAGARA FALLS INTERNATIONAL BRIDGE COMPANY and
the NIAGARA FALLS SUSPENSION BRIDGE COMPANY *vs.*
THE GREAT WESTERN RAILWAY COMPANY and the NEW
YORK CENTRAL RAIL ROAD COMPANY.**

The plaintiffs, having erected a suspension bridge across the Niagara river, leased the rail road floor thereof, excepting the side-walks and gates, to the Great Western Railway Company, during the continuance of its charter, at an annual rent. The railway company was to have the right to extend to other companies and persons the privilege of crossing the rail road bridge, with locomotives, trains and cars, carrying passengers and freight, &c. subject to certain conditions. It agreed not to afford the means to other persons, except rail road passengers, of crossing, and evading the payment of tolls, and was to be responsible that the companies, &c. to whom it should underlet should keep within the restrictions. Regular rail road passengers, coming from or going to a point five miles distant, were, on producing tickets from the rail road company, showing them to be such passengers, to be permitted to pass free of toll. The rail way company agreed to adopt reasonable regulations necessary to prevent evasions of the rights of the plaintiffs to have tolls from all except legitimate railway passengers. It also agreed to allow from its own company, and to procure from the rail road companies with which it should arrange for the use of the bridge, free tickets for the directors and officers of the bridge companies, over their respective railways. An agreement was subsequently made between the Great Western Railway Company and the N. Y. Central Rail Road Company, touching the use of the bridge by the latter company, for the interchange of passengers and freight. The plaintiffs, in their complaint, alleged continued breaches of the contract by the railway company, in the use of its cars in carrying passengers across the bridge, and also in not procuring free tickets or passes for the plaintiffs' directors, &c. over the road of the N. Y. Central Rail Road Company. The complaint alleged that the plaintiffs had sustained large damages, and, as a part of their relief, prayed for a perpetual injunction. The referees found, as facts, that the G. W. Railway Company had refused to furnish or procure for the plaintiffs' directors free passes over the N. Y. Central Road, who had thereby been compelled to pay \$486.61 for fares; that the company had permitted persons who were not railroad passengers entitled to pass free, to cross the bridge on its cars without payment of tolls to the plaintiffs, and had collected tolls of persons so crossing; and that the company, though often requested, had never adopted or enforced reasonable regulations necessary to prevent evasions of the plaintiffs' rights to toll for crossing their bridge, by persons not entitled to cross free.

Held, that the defendant was bound to perform its agreement, by adopting and carrying into effect the reasonable regulations necessary to prevent

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evasions of the plaintiffs' rights; that the plaintiffs were entitled to recover the sums paid for the fares of their directors over the N. Y. Central Road, and the amount of tolls found to have been collected by the defendant from passengers not entitled to pass free; and that they were entitled to an injunction.

Held, also, that such injunction could be sustained upon the ground that an action at law, for damages, would afford no adequate redress, and the injury to the plaintiffs would be irreparable.

Held, further, that by using the bridge in a manner prohibited by the agreement, and permitting persons to cross it free, the defendant was guilty of a continual nuisance, within the authority of the case of *Thompson v. The N. Y. and Harlem Rail Road Company*, 3 (*Sand. Ch. Rep.* 625,) which might be restrained by injunction.

THE plaintiffs are corporations. The creation of the first named was authorized by an act of the legislature of the state of New York, and the second by the legislative authority of Canada. They erected the suspension bridge across the Niagara river below the falls, extending from the bank of the river in the state of New York, to the bank of the river in Canada. The New York Central Rail Road is a corporation owning a rail road from the east end of the bridge, eastward through the state of New York, to Albany, &c.; and the Great Western Railway Company is a corporation having a railway from the west end of the bridge, westward through Canada West. October 1, 1853, the plaintiffs entered into an agreement with the Great Western R. W. Co. in the form of a lease. An agreement to lease, (the bridge and road not then being completed) by which the plaintiffs leased and let to the Great Western R. Co. the rail road floor and structure, excepting the sidewalks and their gates, to be for the entire use of the railway company, and under their control, for and during the continuance of their charter, at a rent of \$45,000 a year. The agreement contains many special provisions; among them, in substance, that the plaintiffs were to have the control and use of the lower, or carriage way of the bridge and its approaches, and the sidewalks of the upper railroad floor and their approaches, &c. The railway company was to have the exclusive right to extend to

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other companies and persons the privilege of crossing the rail road bridge with locomotives, trains and cars carrying passengers and freight, and pursuing a legitimate railroad business, subject to certain conditions. The railway company was not to afford the means to other persons, except rail road passengers, of crossing and evading the payment of tolls to the bridge companies, and they were to be responsible that the companies and individuals to whom they should underlet should keep within the restrictions—they having all the profits arising therefrom. Regular rail road passengers, coming from a point five miles distant from the bridge, or going to such point, on producing tickets from the rail road company, showing them to be regular rail road passengers, were to be permitted to pass over the upper side-walks and lower floor free of toll, walking or riding; the bridge companies having the right to charge the regular toll on the carriages. The railway company was thus restricted, and it agreed to adopt reasonable regulations, necessary to prevent evasions of the rights of the bridge companies to have tolls from all except legitimate railway passengers; and if any agents should be guilty of collusion or evasion, the railway companies were to dismiss such agent, on the fact being made known to them. The bridge companies were to allow the directors and employees of the railway company and such other railway companies as the Great Western should make arrangements with, free tickets to pass the bridge, and the Great Western agreed to allow from their own, and procure from the rail road companies with whom they should arrange for the use of the bridge, as aforesaid, free tickets for the directors and officers of the bridge companies over their respective railways. An agreement bearing date September 29, 1856, was made between the Great Western Railway Co. and the New York Central, touching the interchange of passengers and freight and the use of the bridge. All passengers and their baggage were to be changed in the depot of the New York Central, at the east end of the bridge. The freight

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brought by the Great Western to the bridge for the New York Central Rail Road Co. was to be conveyed across the bridge in the cars of the Great Western, and placed alongside the freight warehouse of the New York Central, and the freight brought by the New York Central to the bridge, to pass over the Great Western, was to be conveyed in the cars of the New York Central company, and placed free of expense or charge for tolls to the Central, alongside the freight warehouse belonging to the Great Western Company. The Great Western also undertook not to permit any passenger trains of any other company than its own to cross the suspension bridge.

The plaintiffs complained of a breach of the contract touching the use of the cars by the Great Western Railway Company, in carrying passengers across the bridge, and also in not procuring free tickets or passes for their directors over the road of the New York Central Rail Road Company. They complained of continual breaches of the agreement relating to passengers crossing the bridge in the cars of the Great Western, and alleged large damages, and as a part of their relief, they prayed for a perpetual injunction. The issues joined were referred to three referees, who found the facts above stated ; and also, among other things, that since March 23, 1855, the defendants have used the bridge, the Great Western for the passage of passengers and freight trains, and the New York Central for freight trains only. Each of the plaintiffs has had a board of seven directors since March, 1855, who have had no compensation for their services, except the free passes stipulated for in the agreement with the Great Western ; and they have had a superintendent and secretary appointed by them jointly, and the Niagara Falls Bridge Company a secretary of its own. That the Great Western has since June 1, 1858, refused to furnish or procure for any of the plaintiffs' directors free passes over the rail roads of the New York Central Company, though often requested, and that the directors have had frequent

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occasion to pass over such rail roads between June 1, 1858, and February 26, 1859, when the action was commenced, and by reason of such refusal, such directors have been compelled to pay fares as passengers to the amount of \$486.61, and the interest thereon from the commencement of the action to the date of the report was \$65.64. That the Great Western, between March 23, 1855, and February 26, 1859, has permitted persons other than the employees and directors of the defendants, and who were not rail road passengers entitled to pass free, under the agreement or otherwise, occasionally to cross the bridge on their cars, without payment of tolls to the plaintiffs, and has collected tolls of persons so crossing, whereby the plaintiffs sustained damages in the loss of their tolls, to the sum of \$361.33. That the Great Western Railway Co. has never adopted or enforced reasonable regulations necessary to prevent evasions of the plaintiffs' rights to toll for crossing their bridge, by persons not entitled to cross free, although the plaintiffs have often requested the said defendant to adopt and enforce such regulations.

As conclusions of law, the referees decided that the plaintiffs were entitled to recover of the defendant, the Great Western Railway Co., the sum of \$486.61, and the interest thereon, \$65.64, and the sum of \$361.33, being in the aggregate \$913.58, as and for damages sustained prior to the commencement of the action, for the aforesaid breaches of the agreement. And that the plaintiffs are entitled to an injunction, as prayed for, restraining the Great Western Railway Company, &c. That the complaint be dismissed as to the New York Central Rail Road Company, with costs, and that the plaintiffs have costs against the Great Western. That a judgment be entered accordingly, but without prejudice to the plaintiffs, or the defendant, the Great Western, to apply to the court upon the footing of the judgment, for a modification of the injunction, &c.

Judgment was entered pursuant to the decision of the

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referees, and the defendant, the Great Western, filed exceptions which are sufficiently noticed in the opinion, and appealed to the general term of this court.

F. E. Cornwell, for the plaintiffs.

S. T. Fairchild, for the defendants.

By the Court, MARVIN, P. J. The defendant excepted to the final report of the referees, and the judgment entered thereon, and to each and every part thereof, and particularly to certain portions of the report finding certain facts, and to the conclusions of law or judgment touching damages, and the injunction. There is a particular exception to the finding of the referees, that the Great Western Railway Company granted to the New York Central Rail Road Company the right to the use of the bridge for the carriage and transportation of freight across the same. This finding of the referees is important, as upon it, the item of damages for neglecting to furnish to the directors of the plaintiffs, free passes over the New York Central is made to depend. This fact was so found from written evidence, and rests upon construction. In the agreement of September 29, 1856, between the two rail road companies, it is provided that "the freight brought to Suspension Bridge by the New York Central Rail Road Company to pass over the Great Western Railway is to be conveyed in the cars of the New York Central Company and placed free of expense or charge for tolls to the New York Central Company alongside the freight warehouse belonging to the Great Western Company and hereinafter referred to." By the agreement or lease of October 1, 1853, the defendant was to have the exclusive right to extend to other companies and persons the privilege of crossing said rail road bridge with locomotives, trains and cars carrying passengers and freight on such terms as they might agree to, subject however to the conditions prescribed in the indenture to the defendant.

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In a subsequent article it is provided that the plaintiffs are "to allow the directors and employees of the defendant, (Great Western,) and such other railway companies as they shall make arrangements with, free tickets to pass their bridge, and the parties of the second part (the Great Western) shall allow from their own and procure from the rail road companies with whom they shall arrange for the use of the bridge as aforesaid, free tickets for the directors and officers of the parties of the first part to pass over their respective railways." On reading these clauses, it seems to me entirely clear that the referees have not erred in their construction of the agreements. The New York Central Company is to convey in its cars, the freight which is to pass over the Great Western, over the bridge to the freight warehouse of the Great Western, free of expense or charge for tolls, that is, no tolls were to be charged to the New York Central. Now is not the New York Central a rail road company with which the Great Western Railway Company made an arrangement for the use of the bridge? Most clearly it is, and an arrangement valuable to the New York Central. It gave the company the use of the bridge free for its freight business destined for the Great Western, and in effect extended its road into Canada. It, at once, under a provision in the agreement between the plaintiffs and Great Western, gave to the directors and employees of the Central free tickets to pass the bridge of the plaintiffs, that is, any portion of the bridge, sideways and lower bridge. It follows that, by the agreement, the defendant was bound to procure from the New York Central free tickets to pass over its railway, for the directors and officers of the plaintiffs. No objection is now made to the validity of such an agreement, but objections are made that the evidence did not show a breach of the agreement. In my opinion the evidence was quite sufficient to sustain the findings of the referees touching the breach of the agreement, and also the damages.

I am also of the opinion that the evidence justified the finding of the referees, touching the permission of persons to cross

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the bridge in the cars of the defendant, in contravention of the agreement, and the collection of tolls from such persons, or some of them, and also the amount of damages sustained by the plaintiffs by reason of such breaches of the agreement. The conclusion of law, to which the referees came, touching the damages, is not erroneous. This brings us to that part of the judgment awarding an injunction, and of which it is understood the defendant (the Great Western) most complains. It is insisted that a proper case for an injunction has not been made. That this question may be properly considered, it may be well to bring together, briefly, the leading facts of the case affecting the question.

The plaintiffs constructed and own the suspension bridge, or rather bridges, as there are two, one above the other, the lower bridge for carriages and foot passengers, and the upper one, having a rail road track, to be used by locomotives and trains of cars. It has also sidewalks for foot passengers. The plaintiffs leased to the defendant "the rail road floor and structure including all its supports, fixtures and gates, excepting the sidewalks and their gates, to be for their (the defendant's) certain use and under their control for and during the continuance of their charter, for rail road purposes." The defendant also has the exclusive right to extend to other companies and persons the privilege of crossing the rail road bridge with locomotives, trains and cars conveying passengers and freight subject to the conditions and restrictions prescribed. The lower bridge and the sidewalks of the upper rail road floor were to be under the control and for the use of the plaintiffs. It is declared in the agreement to be understood that the privilege of the defendant was for the purpose of passing locomotives and cars with freight and passengers in the prosecution of legitimate rail road business, and that it was not to afford the means to any other persons or person except rail road passengers, of crossing and evading the payment of tolls to the plaintiffs, and the defendant stipulated to be responsible that the companies or individuals to whom they should underlet

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should keep within the restrictions and conditions. The plaintiffs agreed to permit rail road passengers to pass over the upper side walks and lower floor free, on the production of tickets showing that they were regular rail road passengers, coming from or going a distance of five miles east or west, to or from the bridge. If such passengers rode across in carriages, then the plaintiffs were permitted to charge the regular toll on the carriages. It was agreed that the defendant should not carry passengers over the bridge or give tickets to them unless they had come or were going at least five miles to or from the bridge; and that the defendant should at all times adopt such reasonable regulations as should be necessary to prevent evasions of the rights of the plaintiffs to have tolls from all except legitimate railway passengers.

The case shows that these provisions have been constantly violated. Persons are carried over the bridge in the cars of the defendant almost daily who are not *regular rail road passengers*, and at times these persons are numerous. It was made a matter of complaint by the plaintiffs for a long time prior to the commencement of the action, and some efforts were made by the defendant to correct the evil. It was arranged at one time that the plaintiffs should put a collector upon the trains for the purpose of receiving or collecting tolls of persons passing over in the cars, who were not the regular rail road passengers, and such collector was employed for a short time, when the defendant excluded him from the cars, the arrangement working badly, and in practice producing difficulties with passengers. The defendant employed, and I suppose still does employ, a *bridge conductor* to take the trains from the New York Central depot across to the defendant's depot, and he collects twenty-five cents from every passenger over the bridge *who has no ticket*, or it is made his duty to do so. It is not made his duty to ascertain where the passenger from whom he collects, is going.

• The conductors on the trains of the defendant from the west continue on over the bridge to the New York Central depot,

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and they collect *bridge fares* and pay over in gross to the bridge conductors. No fare is collected of those who have regular rail road passenger tickets. Now it may be that the person from whom fare is thus collected came to the bridge a passenger in the cars a distance of five or more miles, or that he is going, a passenger in the cars, a distance of five or more miles, and if so, the defendant, by the agreement, had and has the right to carry him across the bridge in its cars. Or it may be that such person is only "passing from one side of the river to the other," and if so, the defendant has no right to carry him in its cars. Some attempts have been made to distinguish those who were passing simply from one side of the river to the other from those called regular rail road passengers, but thus far those efforts have proved substantial failures. It is obvious that the plaintiffs have no practical means of ascertaining who are or who are not properly carried over the bridge by the defendant. The bridge is a mile or so down the river from Niagara Falls, and is resorted to as the place of crossing from one side of the river to the other by a large portion of the persons visiting the Falls. The plaintiffs have no right to put a collector upon the cars, and if they had it would not be possible for him to ascertain who were not "regular rail road passengers." This was tried for a short time with the consent of the defendant and it worked badly. A train crosses the bridge in two minutes, and it is not possible for the bridge conductor employed by the defendant to pass through the cars and make the collections when the train is composed of four or more cars. One witness says, a man who had only to collect tickets, and make no change, might go through the cars while crossing the bridge. The bridge conductor employed by the defendant, it would seem, went through the cars and collected what he could, and sometimes the conductor does not pass through the cars and no collections are made. One of the bridge conductors states that he could not tell where persons were going or where they came from; he had no time to ascertain; he collected fare

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from those having no tickets. In short, it is entirely clear that the plaintiffs have no practical means of protecting their rights—no means of ascertaining the extent of the violation of the contract by the defendant and the amount of damages they sustain by reason of the breaches of the contract. It appears from the evidence in this case that the defendant received from its bridge conductors for tolls received from persons having no rail road ticket from July 2, 1855, to February 15, 1859, the sum of \$9650.62. What portion of this was from persons going simply from one side of the river to the other it was impossible to determine. I think it quite probable that the largest portion was from such persons, and so difficult of ascertainment by the plaintiffs was the fact that the referees, confining the plaintiffs to no strict legal evidence, have only found this item of damages to be \$361.33, and this includes persons carried over by the defendant free—that is, persons the defendant had no right to carry over, but did carry, without collecting any thing from them.

I think it is pretty clear from the agreement between the parties, that it was supposed that there might be some difficulties arising from persons getting on to the cars and passing over the bridge, and it must have been foreseen by the plaintiffs that they would have no means of preventing such acts, or adequate means of knowing the extent and number of such acts; hence they carefully provided in the contract against them, and the entire responsibility for preventing such acts was placed upon the defendant, and the defendant agreed that it would at all times adopt such reasonable regulations as should be necessary to prevent evasions of the rights of the plaintiffs to have tolls from all except legitimate railway passengers. Though the defendant may have some difficulty in putting a stop to the carrying of passengers simply from one side of the river to the other, such difficulty is not insurmountable. It can establish such regulations as will effectually put a stop to the carrying over the river in their cars any persons other than those it has a right to carry. It has

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full control of the rail road floor, the track, and of its cars. It can adopt a system by which it will be able to exclude from its cars all persons not rightfully in them, and it has undertaken, with the plaintiffs, to do this, and it is not unreasonable that it should be required to perform its obligation. By failing to perform, the plaintiffs are greatly damaged, and they have no adequate remedy. True, they may resort to an action for a breach or breaches of the agreement, and may recover when they are able to show breaches, but from the circumstances and nature of the business, it is entirely clear that the plaintiffs will never be able to detect and give evidence of one in ten or a hundred of the breaches of the agreement. The defendant and its agent will not know or be able to inform the plaintiffs, so long as its business shall be conducted as it has been. It may continue to collect tolls, but it will not know, as it has not known, whether such tolls legitimately belong to itself, or whether they are the fruits of a violation of its agreement with the plaintiffs. It must perform its agreement by adopting and carrying into effect the reasonable regulations necessary to prevent evasions of the plaintiffs' rights. In my opinion the referees did not err in deciding that the plaintiffs were entitled to an injunction. It may be that no case precisely in point can be found in the books, but it will not, therefore, follow that the remedy by injunction should not be applied. The jurisdiction of courts of equity, touching injunctions, has been defined and settled in a great variety of cases, but it has never been held that new cases could not arise in which the remedy by injunction would not be applied. It is undoubtedly a general rule, that when the remedy is ample and clear at law, and has ever been so, a court of equity will not entertain jurisdiction.

The legal remedy for the breach of an agreement or covenant, is an action for the recovery of damages; hence, as a general rule, a court of equity will not interpose in advance by injunction to restrain a party to a contract from its breach, but if the contract should be broken, will leave the complain-

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ing or injured party to his remedy by action for damages. If, however, it should be made clearly to appear that the remedy by action for damages would be imperfect and inadequate, a case would be presented in which a court of equity, upon well settled principles, may interpose, and if necessary restrain the party from violations of his agreement. Story says: The jurisdiction of courts of equity has its true origin in the fact that there is either no remedy at all at law, or the remedy is imperfect and inadequate. (*Story's Eq.* § 864.)

In the present case it is perfectly apparent that the remedy by action for damages is imperfect and inadequate. It will afford little or no redress for the grievance complained of. Indeed, until the defendant shall adopt regulations enabling it to ascertain the persons carried across the bridge in its cars, contrary to the agreement, there will be no practicable means of ascertaining the damages of the plaintiffs, and the proof upon which to award damages must come exclusively from those in the employ of the defendant.

Why do courts of equity award injunctions in patent cases? The patentee may recover damages in his action at law for any violation of the rights secured to him by his patent. But this remedy is inadequate, and in order to prevent irreparable mischief or to suppress a multiplicity of suits and vexatious litigations, equity interferes by injunction. (*Story's Eq.* § 930. *Phillips on Pat.* 451.)

Another head of equity jurisdiction, by way of injunction, is the prevention of private nuisances, and this rests upon the principle of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits. There must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as from its continuance or permanent mischief, must occasion a constantly accruing grievance, which cannot be otherwise prevented but by injunction. (*Story's Eq.* §§ 925-929. *Roberts on*

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Principles of Equity, 204.) An injunction will be granted to prevent a party from making erections on an adjacent lot in violation of his covenant. And see *Barrow v. Richard and others*, (8 *Paige*, 351,) where an act was done in contravention of covenants, and it was held that an injunction was proper. In *Thompson v. The New York and Hudson R. R. Co.* (3 *Sand. Ch. R.* 625,) the franchise of a toll bridge company was violated by the defendants permitting persons to cross its bridge free, and it was held that the bridge company was entitled to an injunction to restrain such nuisance.

Injunctions are also granted in aid of specific performance, and to restrain breaches of trust and confidence. (*Drewry on Inj.* 250, *chap.* 6.) Equity in many special cases will restrain acts inconsistent with the due performance of agreements. Many cases are cited by the author in the chapter referred to. In *Martin v. Nutkin*, (2 *P. Williams*, 266,) there was a written agreement that a certain church bell should not be rung at a certain time, and an injunction was granted restraining the ringing of the bell contrary to the agreement. In *Morris v. Colman*, (18 *Ves.* 437,) an injunction was granted restraining the defendant from writing dramatic pieces for another theatre, in violation of his covenant. It was not regarded as a covenant in restraint of trade. (See *Story's Eq.* § 958.) Injunctions in the nature of specific performances are often granted to restrain breaches of covenants between landlord and tenant; as covenants not to remove manure or crops, not to plow meadows, not to dig gravel, sand or coal. In this way the court, in effect, secures a specific performance, and prevents irreparable mischief. (*Story's Eq.* § 721.) In short, without pursuing the question, in my opinion the injunction in this case may be sustained upon the ground that an action at law for damages will afford no adequate redress, and the injury to the plaintiffs will be irreparable. If, in truth, redress could be had by action for damages it can only be had by a multiplicity of actions and litigation without end. The case is peculiar;

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the franchise of the bridges belonged to the plaintiffs, and they leased to the defendant a portion of the bridge for a certain purpose ; under a very special arrangement that it should not be used in a certain specified manner, which if so used, would greatly affect the plaintiffs in their franchise rights retained by them. By using the bridge in the manner prohibited by the agreement, the defendant is guilty of maintaining a continual nuisance, within the authority of the case in 3 *Sand. R. supra*. Again, the relation between the parties created by the agreement is in the nature of a trust ; confidence was reposed by the plaintiffs in the defendant, that it would carefully and faithfully perform its obligations, by at all times adopting reasonable regulations to prevent evasions. The plaintiffs knew that without such regulations, their rights could not be protected. By restraining the defendant, according to the terms of the agreement, it will be coerced into the performance of its agreement touching reasonable regulations, and this for its own security.

The judgment has reserved the right to either party to apply to the court for a modification of the injunction upon the footing of the judgment.

In my opinion the entire judgment should be affirmed with costs.

[ERIE GENERAL TERM, February 9, 1863. *Marvin, Davis and Grover, Justices.*]

CROMWELL vs. THE BROOKLYN FIRE INSURANCE COMPANY
and FRANCIS EICHENLAUBE.

39	227
67	512
44a	42

Where a purchaser agrees to insure for the benefit of his vendor and to assign the policy for his security, and he subsequently procures the building to be insured, but does not assign the policy to the vendor, the agreement operates as an equitable assignment of the *money* payable upon the policy, in case of loss, but not as an assignment of the *policy*. Hence the case does not come within the terms of a clause in the policy, declaring that the interest of the insured in the policy is not assignable, unless with the consent in writing of the insurers, and that the policy shall become void if such interest is transferred or terminated without such consent. LOTT, J. dissented.

APPEAL, by the plaintiff, from a judgment entered at a special term, dismissing the complaint. The action was brought by the plaintiff claiming to be the equitable assignee of a policy of insurance. The only defense which was pressed, on the trial at special term, was, that the policy contained the following clause: "The interest of the insured in this policy is not assignable, unless by consent of this corporation, manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect."

And the defendants claimed that the assignment having been made without the consent of the insurers, avoided the policy. The court sustained the objection, and dismissed the complaint.

J. W. Gilbert, for the appellant. I. If the agreement of the insured be in legal effect, an assignment of the policy, or of an interest in it, it is not within the terms of the condition relied on; because 1. It was made *before the policy was issued*. The condition is to be construed strictly, and cannot be extended by implication to a case not embraced within the fair import of the terms thereof. (1 *Phil. on Ins.* § 107.) The rule governing the construction of all contracts, is that in case of doubt, the presumption is to be

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against the party whose language it is, and that in determining the construction, regard is to be had to the subject matter, and the known motive for introducing the provision. Hence, when the assured made a general assignment of the property insured, and all his other property, including "*all policies of insurance*," in trust for creditors, it was held it did not avoid the policy, upon the ground that such an assignment was substantially *the constituting an agency for applying the proceeds of the policy for the benefit of the assured*. (*Lazarus v. Gen. Int. Ins. Co.*, 5 Pick. 76. *Same v. Commonwealth Ins. Co.*, 19 id. 81.) So, also, an assignment of the policy after a loss, is not within the condition. (*Mellen v. Hamilton Fire Ins. Co.*, 17 N. Y. Rep. 609.)

2. The language of the condition evidently refers to assignments made *after the issuing of the policy*. (a.) The company's consent must be indorsed on the policy *before* the assignment can be made. (b.) The effect of the assignment is to cause the liability of the company to *cease thereafter*. It would be difficult to make a party's liability *cease before it was incurred*. (c.) The company reserve the right to consent, or to return a ratable proportion of the premium *for the time of the risk unexpired*.

3. The transaction is within the principle of the cases in 5 Pickering and 17 N. Y. Rep. above.

4. Where at the time the insurance is effected, the assured has entered into an agreement which will operate *eo instanti* the policy is issued, to vest in a third person a lien upon or an interest in the moneys which the insurer may become liable to pay, upon the policy, the insurer, under a policy like this, can protect itself against such transfer only by making suitable inquiries of the assured, and if deceived, by setting up his fraud in an action upon the policy. If there be no inquiry there is no fraud. Accordingly, where a common carrier, by his contract with the shipper, was entitled to the benefit of any insurance to be effected by the latter upon the goods to be carried, it was held that the contract was valid, and not a fraud upon the insurer, although

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the contract was made before the insurance was obtained and without the knowledge of the insurer. (*Mercantile Ins. Co. v. Calebs*, 20 N. Y. Rep. 173.) 5. The court below rested its decision upon the case of *Smith v. The Saratoga Mutual Ins. Co.*, (1 Hill, 497.) But in that case the policy was issued in February, 1836. The assured assigned the policy September 17th, 1836. The loss occurred March 7th, 1839.

II. The admission by the company of its liability to pay the loss is a waiver of any forfeiture by reason of an assignment of the policy.

III. The agreement to keep the property insured for the benefit of the mortgagee is not an assignment of the policy. It operates only in equity, and as an appropriation of the proceeds of the policy to the mortgagee, in extinguishment of the mortgage. And although sometimes denominated an equitable assignment, it is not within the true interpretation of the condition. *A fortiori* an agreement to assign is not within the condition. That refers to an instrument which *per se* and without the aid of a court of equity passes the title to the policy. This principle has been frequently applied to the condition prohibiting any sale or alienation of the property insured. 1. Where a mortgage was given by the assured. (*Conover v. Mutual Insurance Co.*, 3 Denio, 254. 1 Comst. 290.) 2. Where a contract of sale was made by the assured, and the vendee went into possession. (*Masters v. Madison Co. Ins. Co.*, 11 Barb. 624.) 3. Where the property had been conveyed by a deed absolute on its face, but proven by parol to have been intended as a mortgage. (*Hodges v. Tenn. M. and F. Ins. Co.*, 4 Selden, 416. See also *Hooper v. Hudson River F. In. Co.*, 17 N. Y. Rep. 424; *Buffalo Steam E. Works v. The Sun Mut. Ins. Co.*, *Id* 412; *Wilson v. Genesee Mut. Ins. Co.*, 16 Barb. 511.) In a recent case the general term in the seventh district intimate that the condition in question would not be affected "by an assignment *in invitum*, or by operation of law, but would be intended to mean a voluntary assignment. (*Dey v. Pough-*

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keepsie Mut. Ins. Co., 23 Barb. 623.) 4. An agreement to keep the property insured for the benefit of a vendee, to whom the assured had contracted to sell it, does not affect the rights of the assured to recover, and it follows that if the assured can recover, the rights of the vendee will be equally protected. Accordingly, in a case where it was found as a fact that the plaintiff had contracted to sell the property insured, and to keep it insured for the benefit of the vendee, of which defendant had no notice, it was held that the plaintiff was entitled to recover to the extent of the purchase money unpaid, at the commencement of the suit, although the court also held that the payment of the amount due on the contract during suit operated as a virtual, equitable assignment of the policy to the vendee. (*Shotwell v. Jefferson Ins. Co.*, 5 Bosw. 247.)

IV. The agreement to keep the property insured *for the benefit of Cheslèy*, was an engagement that the proceeds of the policy, in case of loss, should be charged with or appropriated to the payment of the balance of the purchase money of the property, the right to enforce which became vested in the plaintiff. 1. No effect can be given to the agreement, except upon this construction. 2. As such, it operated as an equitable lien upon, or an equitable assignment of the *insurance money* in the event of a loss occurring; and a court of equity on a bill filed against the company and the assured, will decree payment by the former to the equitable assignee, upon the same principle that it enforces a trust. (*Story's Eq. Jur.* §§ 1041–1048, 1040 b, 1055. *Hill on Trustees*, 446, 447. *Parry v. Ashley*, 3 Sim. 97. 2 *Phil. on Ins.* §§ 1976–1981. *Seymour v. Vernon*, 10 L. and E. Rep. 40. *Angel on Ins.* §§ 220–223, 62. *Dickenson v. Phillips*, 1 Barb. S. C. R. 460. *Vernon v. Smith*, 5 B. & Ald. 1. *Hamilton v. McCoun*, 2 Hall, 522. *Carter v. Rockett and The N. Y. F. Ins. Co.*, 8 Paige, 437. *Richardson v. Rust*, 9 Paige, 244.) The case of *Rogers v. Hosack's Executors*, (18 Wend. 319,) is not in conflict; because in that case Gracie himself

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retained the power to collect the money, and merely promised to pay it himself to the creditors when collected. And this decision was afterwards greatly shaken. (*See 25 Wend. 313; 9 Paige, 244.*)

V. But whatever construction be put on the agreement, the plaintiff is entitled to a new trial, if the court are of opinion that it did operate to *transfer the policy*; because the nonsuit was granted solely on the ground that the plaintiff had not proved the consent of the company to an assignment; and no objection was taken to a recovery upon the other grounds above stated.

D. E. Wheeler, for the respondent. I. The clause in question is valid and binding upon both parties. The contract of insurance is peculiarly a personal one, and the insurance company have a right to select the parties whom they will insure. (*Angell on Insurance, §§ 199, 200, 201. 2 Parsons' Maritime Law, 45.*)

II. It is clear on principle, and established by authority, that such a condition as that in this policy is broken by any assignment, equitable or legal, "by sale or otherwise," without the consent of the insurer. (*Smith v. Saratoga County Mutual, 1 Hill, 497. Id. 3 Hill, 508. 1 Phillips Ins. 474, 3d ed. § 879, ch. 10, § 9. Conover v. Albany Co. Mutual, 1 Comst. 290. Id. 3 Denio, 254. People v. Beigler, Lalor, Sup. to Hill & Den. 133; 17 N. Y. Rep. 609. See 2 Story's Eq. § 1040 c.*)

EMOTT, J. Francis Eichenlaube, who is one of the defendants, in November, 1852, made a contract with one Chesley to buy of him a lot of land in Brooklyn, with a house upon it, which Chesley was to build. The price was to be \$1600. Eichenlaube paid \$500 previous to the completion of the house, and the residue was to be paid by the execution of a mortgage on the premises. The house was completed in April, 1853, but Chesley was unable to make or

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convey a title to Eichenlaube at the time, and it was therefore agreed that the latter should go into possession; that Chesley should convey, and receive back his mortgage as soon as he could perfect his own title; and that, in the meantime, Eichenlaube should pay the interest upon the balance of purchase money due, (\$1100,) in the same manner as if he had received a deed and given back a mortgage. Eichenlaube, accordingly, went into possession under this agreement. It was a part of the original contract that Eichenlaube should have the house when completed, insured, and the policy assigned as collateral to the mortgage when executed. When the performance of the original agreement was postponed, and the new agreement made, by which Eichenlaube was to take possession and pay interest until the title could be perfected, it was made a part of this agreement also that Eichenlaube should have and keep the buildings insured for the benefit of, and as security to Chesley. In July, 1855, Eichenlaube procured the house to be insured by the Brooklyn Fire Insurance Co. for \$700, but never assigned the policy to Chesley, or to the present plaintiff, who had by that time succeeded to Chesley's rights, having purchased and taken an assignment in September, 1854, from Chesley, of all his interest in the premises, and in the contract with Eichenlaube. In September, 1858, the house was destroyed by fire, the defendant's policy being still in force. Eichenlaube made default in the payment of the purchase money, and an action was commenced and judgment obtained against him for \$1037.68. This judgment the plaintiff has been unable to collect. The plaintiff having given the defendants notice of his claims, and of the facts in regard to them, after the fire, but before payment of the insurance money was due, has commenced this action against Eichenlaube and the insurance company, to assert an equitable lien upon the insurance money, and compel its payment by the company to him. Eichenlaube has not appeared in the action, but the insurance company defend, and have put in an answer

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alleging that they had paid the loss to Eichenlaube, and also alleging a condition of the policy that it should become void if it should be transferred without consent of the insurers, and that no such consent had ever been given to a transfer from Eichenlaube to the plaintiff. At the trial, the facts as I have collected them from the complaint were admitted, and the policy was put in evidence, containing the ordinary condition against the transfer of the policy or of the interest of the assured therein, without consent of the insurers. The defendants gave no proof of the payment of the insurance money to Eichenlaube, but upon the other facts, as I have stated them, the plaintiff was nonsuited on the ground that he could not recover unless the company's consent to an assignment of the policy to him by Eichenlaube should be shown.

The effect of a breach of this condition, that is of an assignment of the interest of the assured without consent, is to avoid the policy and not merely the assignment. (1 *Hill*, 497.) If the condition is broken there can be no recovery upon the policy by any one. Such clauses and conditions in policies of insurance have been upheld by the courts, as within the power of parties to make, and a part of their contract when made. They have not, however, been liberally construed, and insurers are required to bring themselves strictly within them, in order to avail themselves of their protection. In *Mellen v. Hamilton Fire Insurance Co.* (17 *N. Y. Rep.* 609,) it was held that such a clause did not apply to a transfer of a policy or of the claim of the assured upon it, made after the happening of a loss. So also, it has been held that an executory contract for the sale of real property is not an alienation, within the meaning of a clause forbidding the assured to *alien* the insured premises by sale or otherwise. (11 *Barb.* 624.)

In the present case there has certainly been no formal or legal assignment of the policy by Eichenlaube. The condition under which this defense is made, forbids any assign-

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ment of the interest of the assured in the policy by sale or otherwise, and any assignment of the policy without the consent of the defendants. The contract between Chesley and Eichenlaube bound the latter to assign his interest in the policy as security for the payment of the unpaid purchase money of the premises. We have a right to assume that if such an assignment had been made, it would have been made in conformity with the terms of the policy, and the consent of the company would have been obtained to it in due season. The contract between these parties was for a legal and not an illegal act; it was for a valid and sufficient assignment, and of course it implied that the assent of the insurance company should be duly obtained to a formal assignment of the policy when made. Eichenlaube, however, never made any assignment of the policy, or of his interest, to Chesley or to the plaintiff. All that he did was done before the policy was made, and that, as we have seen, was to agree to procure a policy of insurance, and to make a due and valid assignment of that policy to his creditor. If this operated as an assignment of the future policy, rendering it void, it may not be easy to see how the insurance could in any event be sustained, since before the policy was executed no consent could be had to its assignment. The doctrine of the defendants pressed to its logical results, would avoid the policy before it was issued, and that irretrievably.

This may be too strained or subtle a course of reasoning. But upon a broad view of the position of these parties, the plaintiff is not an assignee of the policy, nor does he assert a title to the moneys due from the defendants through its assignment, or a transfer of the interest of the assured. His claim is that Eichenlaube had agreed to insure the premises for his benefit, but that he has neither insured his vendor's interest nor assigned the policy to him, but having effected an insurance for his own benefit, and the property having been destroyed by fire, and the insurance money become payable, that the vendor has an equitable lien upon any such

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insurance money due to his vendee in consequence of the original agreement between them. It will be observed that the question does not arise between Chesley or the plaintiff, and Eichenlaube or his creditors; nor is there any evidence of any payment to Eichenlaube. We are to determine the case as if no such payment had been made. Making such a payment indeed might seem to admit the validity of the policy, and to waive this condition; for the breach of the condition avoids the original contract, and not the assignment. If the insurance company is not liable to the plaintiff for the reason for which this nonsuit was granted, it is not liable to Eichenlaube, or to any one else.

In *Carter v. Rockett*, (8 Paige, 437,) Chancellor Walworth expressed the opinion that when the assured had made an agreement to insure for the protection of a third party, having an interest in the premises, such third party might acquire a lien upon the insurance money to the extent of his interest. Such a lien might be enforced upon such an agreement, against the debtor, in a case where no equities of other creditors intervened, although as against such creditors unequivocal proof of an assignment would be demanded. (See *Dickinson v. Phillips*, 1 Barb. S. C. R. 454.)

It is true, that in creating and enforcing such a lien, courts of equity proceed upon the ground that the acts of the parties, or the operation of the law, or both, will effect an equitable assignment of the subject of the lien. It is urged in this case that an equitable assignment of the policy of insurance is as much within the prohibition of the policy, and within the mischief it was intended to prevent, as a legal assignment; and it is contended that this is an answer to the present claim upon the insurance money. Without stopping to consider how far these premises would be true, it will be seen upon a little reflection that the conclusion does not follow, and that the argument is not applicable to a case like the present. The lien which is here asserted is not upon the policy, but upon the money which had become due under it.

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The subject of the lien is the fund which is in the hands of the insurance company for the payment of the loss. The agreement was that the insured should make a valid and legal assignment of the policy, or of his interest in it. That creates a trust as to the money which has now become payable by this policy in consequence of the destruction of the insured property, and a lien upon this money. It operates as an equitable assignment of that fund to the plaintiff, but not as an assignment of the policy. Although there must be an equitable assignment of this fund, in order to an equitable lien upon it, or a trust for payment out of it, that is no more equivalent to an equitable assignment of the policy than a legal assignment or transfer of the money due after a loss is equivalent to a similar assignment of the policy, which was the question presented in *Mellen v. Hamilton Fire Ins. Co.* (17 N. Y. Rep. 609.) The lien which is claimed by the present plaintiff is upon a fund which is created by the concurrence of the destruction of the property insured, and the liability of the insurers to pay the amount of the loss by such destruction; while the defense of the insurance company goes to deny any liability of the insurers. Until that is disposed of no fund will exist of which an assignment could be made. The short answer to the objection is that the plaintiff is an equitable assignee of the fund, and not of the policy, and therefore not within the clause forbidding the transfer of the latter.

The defendants gave no proof, at the trial, of a payment of the loss to Eichenlaube, and we are not required or prepared to discuss any question which might arise out of such payment. I am of opinion that upon the facts now appearing the plaintiff was entitled to recover, and that the present nonsuit must be set aside and a new trial granted.

BROWN, J. concurred. LOTT, J. dissented.

New trial granted.

[KINGS GENERAL TERM, Feb'y 9, 1863. *Emott, Brown and Lott*, Justices.]

CATHARINE G. JOHNSON *vs.* JOSEPH BENNETT.

It is not true that a sale and conveyance by a trustee, of the trust property, so that he becomes the purchaser himself, is void. Such a sale and conveyance is capable of confirmation by the express act of the *cestui que trust*, by acquiescence, and lapse of time; and a title acquired by a subsequent purchaser in good faith and without notice of the subject conveyed, will be good, without dispute. *Per BROWN, J.*

Sales and conveyances of this character are voidable only: They are voidable in the equity courts, at the instance of the *cestuis que trust* alone, not because they are fraudulent, or for inadequacy of price, but upon a rule of morality and policy having reference to human infirmity, which forbids that a man shall act as vendor, for others, and as purchaser, for himself, of the same subject matter and at the same time.

The grounds upon which courts of equity interfere between *cestuis que trust* and trustees and their grantees with notice, affirm the validity and force of the title at law. Otherwise such courts would have no jurisdiction.

Though the trustee may have acted from the best motives, and the sale may have been fairly conducted, and the price obtained full and ample, yet the courts will open and order a resale if the parties—the *cestuis que trust*—are not satisfied with it, and they make their claim, and their bill is filed within a reasonable time.

A decree vacating a sale of that kind will be upon terms, in regard to the purchase money already paid and perhaps distributed in execution of the trusts, so as to insure justice and equity to all concerned.

A *cestui que trust*, after having assented to a sale made by the trustee, by accepting his share of the proceeds, cannot maintain ejectment to recover possession of his share of the land, on the ground that the sale was void.

Where a testator directed his executors to sell certain land, convert it into money, and invest it until the youngest child should become 18 years of age, and then distribute the same among his children; *Held* that this presented a case of *equitable conversion*, and the estate became impressed with the character of personal property, and was to be distributed as such.

And the land having been sold by the executors, and the share of one of the married daughters of the testator, in the proceeds, paid over to her husband, who gave his receipt therefor; *Held* that the husband thereby extinguished all claim which he had upon the proceeds, as such husband, as well as all claim which his wife had upon the lands sold.

THIS was an action to recover the possession of certain premises in the town of Westfield, Richmond county. The plaintiff was nonsuited, and her complaint dismissed, on the trial at the circuit, and upon exceptions taken, she moved for a new trial.

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Truman Smith, for the plaintiff. I. *Prima facie* the plaintiff, on the death of her father, acquired a title to one-ninth part of the premises, which was increased to a one-eighth by the death of her brother Stephen in 1818, and to a one-seventh by the death of her brother Henry in 1819. Was this title affected in any degree by the will of John Seguire, which took effect on his death in 1813? Not at all. The clause relating to these premises is as follows: "I order and require that all my land lying south of Wood Row shall be sold as soon after my decease as possible, and, when sold, the proceeds shall be put out at interest, and the interest regularly paid unto my wife, until my youngest child is eighteen years of age, provided my wife does not marry." Now, there is a distinction between a devise of land to executors, with a power to sell, and a mere direction to executors to sell. In the former case, we have a power coupled with an interest, and in the latter, one which is simply collateral, and without interest, or what the law denominates "a naked power." When the power is coupled with an interest, the estate vests in the donees of the power, but where it is not so coupled, or where it is collateral and naked, the estate descends to the heirs at law, and remains vested in them until the power is properly executed. In the case of *Bergen and another v. Bennett*, (1 *Caines' Cas.* 15,) Mr. Justice Kent, in language alike appropriate and just, lays down the rule as follows, to wit: "If a man, by his will, directs his executors to sell his land, this is but a bare authority without interest; for the land in the mean time descends to the heirs at law, who, until the sale, would at common law be entitled to the profits; but if a man devises his lands to his executors to be sold, then there is a power coupled with an interest, for the executors in the mean time, take possession of the lands and of the profits." In the present case, the testator did not devise the premises to his executors with power to sell, &c.; they derived no estate or interest whatever under the will, and were not authorized to take the rents, issues and profits. The

testator simply ordered and required them to sell the premises as soon as possible, and he thus gave them a power which was wholly collateral to the estate. It was a mere naked power, or as Judge Kent denominates it, "A bare authority, without interest," so that the plaintiff undoubtedly took, on the death of her father, a title or right to an undivided share in the premises, the power in the will notwithstanding. The estate, or interest, became and was vested in her as one of the heirs at law, and the only question is whether that estate has been divested by any subsequent proceeding taken by the executor and executrix under the will.

II. The deed of the 27th April, 1826, from Joseph and Margaret Seguire to Robert Seguire, was and is, on its face, null and void, for the following reasons: 1. It is at least doubtful whether the deed is so drawn as to be in form or substance an execution of the power in question. It is true, in the introductory part of the deed, the grantors characterize themselves as executor and executrix; but that may be, and we submit is, a mere *descriptio personarum*. Then, in the operative part, they commence with the intimation that they were thereby executing, or attempting to execute the will, but, subsequently, they speak and act in their individual character, and in that only. It is Joseph and Margaret who "grant, bargain, sell, alien, enfeoff, convey and confirm * * * * all the estate, right, title, interest, property, claim and demand whatsoever," which they, the said Joseph and Margaret had in the "granted and bargained premises," but not the estate, right, title and interest which the testator had therein, at his decease, and finally they appropriately sign the instrument as individuals, and not in their representative capacity. This is not sufficient. 2. However this may be, we submit that Joseph Seguire, as executor, and Margaret Seguire, as executrix, had no power whatever to sell and convey this property under the will, in April, 1826. "*I order and require that all my land lying south of Wood Row shall be sold as soon after my decease as possible.*" We deny that a sale in 1826,

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that is to say more than twelve years and six months after the death of the testator, was even a nominal execution of such power. (a.) The language of the clause is exceedingly peremptory: "*I order and require that all my land lying below the Wood Row shall be sold.*" At any indefinite time? Not at all; but "as soon after my decease as possible." Not for any particular sum or amount; for the testator knew that to require the executors to obtain any precise number of dollars per acre might postpone a sale indefinitely. He left them, therefore, to obtain what they could for the property, but ordered them to sell as soon as possible. No doubt he did not intend or expect such precipitancy as would recklessly sacrifice this property, but his representatives were at once, after qualifying, to enter on the business of selling, and were, by advertising and other suitable measures, to effect a sale as soon as possible. If they could not sell at one price, they were bound to sell at another. The testator may be presumed to know the situation and character of the estate, the condition of the market, and what was for the interest of his family. It is obvious he was of the opinion that an immediate sale was practicable. Had he not a right to order it? From whom did the executor and executrix derive an authority to set aside *the will* in this respect? It is insisted that a sale at the end of more than twelve years and a half after the death of the testator, was not a good execution of the power. (b.) Assuming that the executor and executrix, in executing the deed of the 27th of April, 1826, must be understood to speak and act in their representative capacity, then it is submitted that such deed is void, for the reason that it does not sufficiently appear on the face of the instrument that it was made or given in conformity to the power. (c.) But the objectionable character of this proceeding is greatly enhanced by the fact that one of the devisees of the power (the executrix) is made both the immediate and the principal beneficiary of its execution. The testator first directs the land in question to be "sold, as soon after his decease as possible," and

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then the will proceeds as follows: "The proceeds shall be put out at interest, and the interest regularly paid unto my wife, until my youngest child is eighteen years of age, provided my wife does not marry." By a subsequent clause he gives to his wife all the residue of his estate, both real and personal, until his youngest child attains the age named; but in case she married, she was to have certain specific legacies, and after that date, whether she married or not, one-third of the proceeds of all his property, which he directed to be sold and put out at interest for her use during life. So that she was to have the whole interest of the proceeds of the Wood Row property till his youngest child was eighteen, and thereafter one-third of the interest arising from his whole estate. The youngest child was her son Bornt, who was born on the 21st day of October, 1807, and who of course attained 18 years of age in October, 1825. Now, during the whole of the time that elapsed after the decease of the testator up to the date of the deed of April 27, 1826, she remained occupying this land, in place of selling it as soon as possible. How much the dwelling house, fences and soil deteriorated in the meantime, it is difficult now to say—no doubt very considerably. And what makes the case worse for the defendant is, that his testator (the other executor) came in under the executrix, as her tenant, and helped her consume the property and eat out its substance. (d.) It is shown that the testator intended to make a provision for his wife, far beyond the value of dower, and one-third of such personalty as might remain after paying his debts. It was competent for her to waive a provision in her favor, and she did so by not selling in conformity with the will. The estate having descended to and vested in the heirs at law, on the death of the testator, was, for the reason here indicated, discharged of the power long before the 27th day of April, 1826, and then the title became absolute in their hands. (e.) We have already adverted to the distinction between a power coupled with an interest and a collateral or naked dower, in respect to the operation and effect of the one

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or of the other on the inheritance. But there is another distinction, which, perhaps, in this case, is more important, and that may be found in the difference in construction which courts of law ever make between them. If the estate and power be associated, or, in other words, vested in one and the same person or persons, then the courts give a liberal construction to the power, and uniformly turn over parties claiming to have been aggrieved by its exercise to courts of equity. The reason is obvious; the donees of the power hold the inheritance and have the legal right, and it is with such rights that courts of law deal, and with those only. An abuse of the power cannot divest the estate, and when the party complaining gets into equity he must do equity. The whole subject is there liberally considered. But where the power is merely collateral, or, in other words, where the estate is vested by inheritance in one set of persons, and the power is by will given to another, it is *strictissimi juris*, and the validity of its execution has to undergo a rigid ordeal. The question is uniformly made in courts of law. (*Co. Litt.* 181 a, 236 a. 4 *Kent*, 320-325. *Sugd. on Vend.* 319. *Pow. on Devises*, 291-310.) The distinction referred to is recognized in *Bergen and another v. Bennett*, (1 *Caines' Cas.* 15,) where Kent, justice, says, that in the case of a naked power, "if one executor dies the power at common law would not survive," but that in the other case, "as the estate so also the trust would survive to the surviving executors." So, also, where there is a power to dispose of lands by devise or will, such power cannot be executed by grant; and on the other hand, where the agency is to be the latter, the donee of the power cannot resort to the former. (4 *Kent*, 331. *Moore v. Diamond*, 5 *R. I. Rep.* 121.) So where a power is conferred, as in this case, to sell lands, it is not competent for the grantee of the power to mortgage them. (*The Albany Fire Ins. Co. v. Bay*, 4 *Comst.* 9.) So, where a power is granted to sell by and with the consent and advice of two or more persons, the consent of all is indispensable, and the death of either

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abrogates the power, and renders its execution impossible. (*Barber v. Cary*, 1 *Kern*. 397.) But it is useless to multiply cases. Judge Kent, in his Commentaries, (*vol. 4, p. 330,*) does ample justice to the subject. He says: "It is the plain and settled rule, that the conditions annexed to the exercise of the power must be strictly complied with, however unessential they might have been if no such precise directions had been given. They are incapable of admitting any equivalent or substitution, for the person who creates the power has an undoubted right to create what checks he pleases to impose to guard against a tendency to abuse. The courts have been uniformly and severely exact on this point." But it seems that the supreme court has had to do with the element of time, as one of the conditions to a valid execution of a power; and has said that the testator has a right to prescribe such a condition, and that it is the duty of the court to enforce it. (*Richardson v. Sharpe*, 29 *Barb.* 222.) What are we to think of a peremptory order that the donees of the power "Shall sell as soon after" the decease of the donor "as possible?" and no sale till after the lapse of more than thirteen years and six months? Besides, the directions were, that the land lying south of Wood Row should be sold as soon *after* as possible, but that all the land north of said road (meaning his homestead) should be sold when his youngest child should attain 18 years of age. So that the sales were to be made in a precise order. First, the land south, as soon after the will should take effect as possible, and the land north (or the homestead) on the event named, which we have seen occurred Oct. 27th, 1825. But the executor and executrix reversed the order prescribed; they sold the homestead first, that is to say, in 1825, and the land in question in 1826. As they were not endowed with the power to make "the first last and the last first," it is submitted that the whole proceeding was null and void.

III. The invalidity of the deed of the 27th of April, 1826, (from Joseph and Margaret Seguire to Robert Seguire,) for

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want of delivery distinctly appeared on the trial, from the testimony of Robert, and other proof.

IV. But was there a sale of this property, which the testator ordered in such positive terms? An agreement for a sale is a contract executory, and an actual sale is a contract executed; and to both there must be two parties, a vendor and a vendee, whose minds must meet. It is a settled rule of the common law that no man can be vendor and vendee in one and the same transaction, and that any attempt to effect a sale in that manner is null and void. (*The Buffalo Steam Engine Works v. The Sun Mutual Insurance Co.*, 17 N. Y. 401.) If this be the rule in the case of a power coupled with an interest, how much more must it obtain in the case of a naked power, where the estate or interest of third persons is to be affected. Lord Coke, in his commentaries on Littleton, after speaking of a power to sell, coupled with an interest vested in executors, and a naked power so vested, adds: "Yet in neither of those cases—albeit one refuse—can the other make sale to him that refused because he is party and privy to the last will, and remains executor still." (*See Co. Litt.* 113 a.) It is certain that Joseph, as executor, and Margaret, as executrix, could not have executed a deed conveying the premises directly to Joseph and Bornt. Could they do the same thing by a circuitry? Could they convey the premises even to a stranger by a deed of gift, or without consideration? Before they executed any deed they were bound to make a contract of sale. This they did not do in this case. In considering the validity of the execution of one of these powers, the contract for a sale is more to be regarded than the deed consummating the same, although the latter be in due form. (*Harlan v. Brown*, 2 *Gill's Md. R.* 376.) The plaintiff not being a party to the transaction, is not estopped from showing the facts to avoid the deed. Being a married woman is another reason why there should be no estoppel. (*Learned v. Talmadge*, 26 *Barb.* 443.) It is certain that we have a right to make this question in a

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court of law. (*The Buffalo Steam Engine Works v. The Sun Mutual Ins. Co.*, 17 N. Y. Rep. 401-4. *The Lessees of Swayze and Wife v. Burk*, 12 Peters, 11.) The defendant endeavors to help out the case by calling witnesses as to the value of the land in 1826. At this late day such evidence is utterly unreliable. No such inquiry can be entertained, either at law or in equity. It is excluded on principles of public policy, to obviate the danger of a perversion of the facts, and a consequent defeat of the ends of justice. This danger results from the nature of the inquiry. The response of a witness can be nothing but an opinion easily obtained, and worthless after the lapse of any considerable time. In *Devoue v. Fanning*, (2 John. Ch. R. 251-59,) Kent, Ch. says: "However innocent the purchaser may be in the given case, it is poisonous in its consequences." He quotes (*id.* 261) Lord Alvanley, in *Campbell v. Walker*, (5 Ves. 678. 13 *id.* 600,) thus: "It is impossible to know whether any advantage has been gained by the purchaser, or whether the trustee did all that he ought to have done." Also Lord Eldon, in *Ex parte Lacey*, (6 Ves. 625,) "When a trustee undertakes to manage for others, he undertakes not to manage for his own benefit." Again, "The ground of the rule is, that though you may see in a particular case that he has not made an advantage, it is impossible to examine in ninety-nine cases out of a hundred whether he made advantage or not." Also, the same Chancellor, in *Ex parte Bennett* (10 Ves. 385,) "It is settled that it is not requisite to show that the trustee has made any advantage by the purchase. If a trustee can buy in an honest case, he may in a case having that appearance, but from the infirmity of human testimony it may be grossly otherwise; and yet the power of the court would not be equal to detect the deception. Human infirmity will not permit a man to exert against himself that prudence which a vendor ought to exert in order to sell the estate most advantageously for the *cestuis que trust*, and which a purchaser is at liberty to exert for himself, in order

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to purchase at the lowest price." Also, the opinion of Mr. Justice Benson in *Munro v. Allaire*, (2 *Caines' Cases in Error*, 183,) "Although it may, however, seem hard that the trustee should be the only person of all mankind who may not purchase, yet for very obvious consequences it is proper that the rule should be strictly preserved, and not in the least relaxed." These views are vigorously sustained and abundantly vindicated by Chancellor Kent (2 *John. Ch.* 254-271.) If such be the rule in chancery, where both the estate and the power is vested in a trustee, how much more should it obtain at law, where the court is dealing with a mere naked power, and the party committing the abuse is thereby seeking to divest the title of the heirs-at-law. The legislature of this state has distinctly recognized this principle by providing that a mortgagee may "fairly and in good faith" purchase premises advertised for sale under foreclosure, (3 *R. S.* 861,) but that a sheriff conducting a sale, under an execution, "shall not directly or indirectly purchase," and if he does, "such sale shall be void." (*Id.* 651.) The court below should, in place of dismissing the plaintiff's complaint, have submitted the case to the jury with the instruction, that as it appeared that Joseph Seguire, one of the vendors, was, through the medium of Robert, also one of the vendees, the deed in question was, and is, null and void.

By the Court, BROWN, J. This is an action of ejectment to recover the possession of an undivided seventh part of a lot of land in Westfield, Richmond county. It was tried before Mr. Justice SCRUGHAM and a jury, at the Richmond circuit, in November, 1861, when the complaint was dismissed and the plaintiff nonsuited. The plaintiff thereupon excepted, and the exception was ordered to be first heard at the general term.

The plaintiff claimed title as one of the children and heirs at law of John Seguire, who died seized of the premises in dispute on the 6th of October, 1813. He left a last will and

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testament, bearing date September 4th, 1813, which was executed and published in due form of law to pass real estate, and therein appointed his brother, Joseph Seguine, his brother-in-law, George W. Barnes, and his wife, Margaret, the executors and executrix thereof. The will was proved before the surrogate, and letters testamentary were issued to Joseph Seguine and Margaret Seguine, who took upon themselves the execution thereof. George W. Barnes declined to accept the trust. The will contained this direction amongst others: First. "I order that so much of my estate shall be sold as shall be sufficient to discharge all my debts. I order and require that all my land, lying south of Woodrow, shall be sold as soon after my decease as possible, and when sold the proceeds shall be put out at interest, and the interest regularly paid unto my wife until my youngest child is eighteen years of age, provided my wife does not marry;" at which time it was to be divided, with the proceeds of certain other lands, among his children, in the proportion of three parts to each of his sons, and two parts to each of his daughters. He gave his wife Margaret all his real and personal estate which was unsold, until his youngest child was eighteen years old, unless she should marry. The premises referred to in that part of the will quoted, as lying south of Woodrow, are those in dispute, and contain forty acres of land. The proof showed that efforts were made by Joseph Seguine, the executor, to sell the land, which were not effectual; Margaret, the widow, remaining in the possession and taking to her own use the profits thereof, from the time of the death of the testator until April 27th, 1826, at which time Joseph Seguine and Margaret, as such executor and executrix, by deed of that date, sold and conveyed the premises in fee to Robert Seguine, one of the testator's children. This deed describes the grantors as executor and executrix of the last will and testament of John Seguine, deceased; recites that he died seized of the premises granted, and refers to the power given to his executors in his will to sell, and de-

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clares that the deed is made in execution of the will. The consideration is therein said to be \$700. It was acknowledged on the day after its date, and was recorded on the 2d of May thereafter. Robert Seguire, by his deed, bearing date April 28th, 1826, conveyed the premises in fee to Bornt Seguire and the said Joseph Seguire. And on the same day Margaret, the widow, released to them her dower in the premises for the consideration of one dollar. Bornt Seguire, who was a brother of the testator, and Joseph Seguire, immediately entered into possession and so continued until the death of Bornt, who devised his interest to Joseph, who also remained in possession until his death, in 1849. He left a will, in which he devised the lands to Joseph Bennett, the defendant, who has been in the possession since that time. The proof also showed that the \$700 consideration money, mentioned in the executors' deed, was credited to the estate of the testator and distributed amongst his sons and daughters in execution of the trusts of the will. There is amongst the exhibits a receipt from John Johnson, the husband of the plaintiff, Catharine, given to Joseph Seguire, the executor, in which he acknowledges to have received \$363.28, in full of the legacy bequeathed to Catharine by the will of her father, except her share in certain moneys of the estate held by the widow, Margaret, for life, and a small sum held for the life of one Frederick Seguire. This receipt is dated June 19th, 1827. There is also a similar receipt signed both by John Johnson and Catharine G. Johnson, bearing date October 2d, 1849, for \$173.34, given to Henry S. Seguire, executor &c. of Joseph Seguire, deceased, which is declared therein to be in full settlement of all claims against the estate of Joseph Seguire. The plaintiff, Catharine, was born in May, 1805. She married John Johnson, at what time does not appear, but before June 19th, 1827, the date of his receipt. He died December 19th, 1859. The widow, Margaret, never married again.

The effect of the two deeds—that from the executors to

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Robert Seguire and that from him to Bornt and Joseph Seguire—is one of the principal questions in dispute. Did they have the effect to pass the title? That Robert Seguire does not recollect the transaction, and thinks he did not sign the latter deed, is of no value but to show the infirmity of his memory. There are the two instruments duly acknowledged, and recorded thirty-six years ago, and there are the possessions under them for that period of time. Against such facts his want of recollection has no weight whatever. The theory of the plaintiff is that Joseph Seguire, the trustee, could not become the vendor and purchaser of the trust property at the same time. In one sense this is true. He could not in that way acquire a perfect title—a title indefeasible and absolute against all the world. But the real question is, whether he did not acquire such a title as carried with it the right to the possession—the right of property and its incidents—the right to hold and enjoy, and to transmit to others, so long as the title which he had was not vacated and set aside. The title at common law is good. It is not true that a sale and conveyance by a trustee, of the trust property, so that he becomes the purchaser himself, is void. Such a sale and conveyance is capable of confirmation by the express act of the *cestui que trust*, by acquiescence and lapse of time; and a title acquired by a subsequent purchaser, in good faith, and without notice of the subject conveyed, would be good beyond dispute. These consequences could in no case ensue if the sale and conveyance was absolutely void; because that which is void does not exist, and cannot be confirmed, nor become a connecting link in the chain of title. Sales and conveyances of this character are voidable only. They are voidable in the equity courts, at the instance of the *cestuis que trust* alone, not because they are fraudulent, or for inadequacy of price, but upon a rule of morality and policy, having reference to human infirmity, which forbids that a man should act as vendor for others and as purchaser for himself of the same subject matter, and at the same time.

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The trustee may have acted from the best motives ; the sale may have been fairly conducted, and the price obtained full and ample, yet the courts will open and order a resale if the parties—the *cestuis que trust*—are not satisfied with it, and make their claim, and their bill is filed within a reasonable time. I quote from the opinion of the chancellor in *Davoue v. Fanning*, (2 *John. Ch.* 251,) a leading authority in our courts on the subject: “However innocent the purchaser may be in the given case, it is poisonous in its consequences. The *cestui que trust* is not bound to prove, nor is the court bound to judge, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power distinctly and clearly to show it. There may be fraud, as Lord Hardwicke observed, and the party not able to prove it. It is to guard against the uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come at his own option, and without showing actual injury, and insist upon having the experiment of another sale.” In *Campbell v. Walker*, (5 *Vesey*, 678 ; 13 *id.* 600,) Lord Alvanly, then master of the rolls, declared the rule necessarily existed to this extent. That was a devise of real estate to trustees to sell. They sold at auction, and bought in a part for themselves at a fair price. There was no proof that the sale was at an under value, or that the sale was not bona fide and regular. The bill was filed in behalf of residuary legatees, then infants, to have the sale set aside and the lands resold. It was accordingly so decreed, and the master of the rolls said the rule did go to the extent that the *cestui que trust* had a right to set aside the purchase and have the estate resold, if he chose to say in a reasonable time, that he was not satisfied with it. The trustee purchases subject to that equity. He buys with that clog.” In making a decree vacating a sale of this kind, the court will make it upon terms, in regard to purchase money already paid, and perhaps distributed, in execution of the trusts, so as to insure

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justice and equity to all concerned. In the present case the proof shows that the plaintiff and her husband have accepted their share of the proceeds of the sale, and, if the rule claimed by her counsel be affirmed, that the sale is absolutely void, she may take her share of the lands in addition. This cannot be. The learned counsel for the defendant has shown by a reference to a multitude of cases, that the grounds upon which the equity courts interfere between *cestuis que trust* and trustees and their grantees with notice, affirm the validity and force of the title at law. Otherwise the chancery courts would have no jurisdiction. He has exhausted the subject, and left nothing to be added to what his elaborate brief contains. I therefore conclude that the plaintiff cannot maintain this action to recover the possession of the lands.

I refer briefly to another consideration which is fatal to the claim of the plaintiff. The direction to the executors was to sell the land, convert it into money, put it at interest until the youngest child became eighteen years of age, and then distribute it amongst his children in the proportions named. Upon the principle of the case of *Kane v. Gott*, (24 *Wend.* 641,) and the authorities there referred to, the estate became impressed with the nature of personal property, and was to be distributed as such. It presents a case of equitable conversion. I extract from the opinion of the court: "On the principle that equity considers that as done which ought to have been done, it has been long established that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are to be converted, and this in whatever manner the direction is given, whether by will or by contract, &c. It follows, therefore, that every person claiming property under an instrument directing its conversion, must take it in the character which that instrument has impressed upon it." Quoting *Jarman's edition of Powell on Devises*; so, "where executors are clothed with a trust to sell the real estate for money,

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and appropriate the avails to the uses of the will in the form of personal property, no doubt was ever entertained that it must be considered, in equity, the same as if the testator himself sold the land and then bequeathed the consideration money." Referring to 2 *Powell*, 64. *Leigh & Dalzell on Eq. Con.* 48. The will of John Seguine was made, he died, and the lands under the power were converted into money long before the statutes concerning the rights of property of married women were enacted. The plaintiff, Catharine G. Johnson's share of the proceeds of the property lying south of Woodrow, and referred to in the will, became the property of her husband, John Johnson, by virtue of his marital rights, if he chose to reduce it to his possession during life. It was in every sense personal property; and, like all other personal property and choses in action of the wife, the husband might take it to his own use, sue for it in his own name, release it or assign it over to another person, and vest the assignee with the right of property in it. We have already seen that John Johnson, the husband, accepted his wife's (the plaintiff's) share of the proceeds of the lands, and gave his receipt therefor. He thereby extinguished all claim which he had upon them as her husband, as he certainly did all claim she could possibly have upon the lands of which they were the proceeds.

The facts upon which the rights of the parties depend were not put in dispute upon the trial, by conflicting evidence, and there was nothing for the jury to pass upon.

Judgment should be entered for the defendant upon the nonsuit.

The case of *Ann Journeay v. Joseph Bennett*, involving the same questions, and depending upon the same evidence and in which a similar decision was made at the same circuit, should be disposed of in the same way, and judgment of nonsuit entered therein for the defendant.

[KINGS GENERAL TERM, February 9, 1868. *Brown, Serugham and Lott, Justices.*]

BROWN *vs.* CHADSEY.

39	253
54	494
61	102

In an action for false imprisonment the jury has a right to give damages beyond a mere compensation to the plaintiff for his injuries, and inflict a punishment upon the defendant for his conduct; but not to an arbitrary amount.

Where the plaintiff was arrested by a police officer, early in the morning, at the request of the defendant, or upon facts or circumstances of suspicion communicated by him, and was taken to the police office in Centre street, New York, where he remained some time, no one appearing to make a complaint against him; and he was then required to appear at a subsequent hour, 10 o'clock, at which time, no one appearing against him, he was discharged, on his promise to appear again, if required; the plaintiff having recovered a verdict for \$2000 for this arrest and false imprisonment; *Held* that the damages were excessive, and a new trial was granted.

If a private person takes any part in an unlawful imprisonment of another, by an officer, he becomes a principal in the act, and is liable for the trespass. But if he merely communicates facts or circumstances of suspicion to the officer, leaving him to act on his own judgment and responsibility, he is not liable at all in an action either for malicious prosecution or for false imprisonment.

Under the code, in an action for false imprisonment, a justification on the ground that the defendant had reason to suspect that a criminal offense had been committed by the plaintiff, must be pleaded specially; and the answer must first show the actual commission of an offense, and then the cause to suspect the plaintiff of its commission. If less than this is pleaded, or if the evidence comes short of this, it can only go to the question of damages.

Where no justification is pleaded, evidence showing grounds for suspecting the plaintiff of the commission of a crime, is admissible upon the question of damages only; but upon that point it is material as going to relieve the defendant from the imputation of having acted from improper motives.

Actions for malicious prosecution and for false imprisonment are essentially distinct, and require different rules both of pleading and evidence.

APPEAL from a judgment entered at the circuit, on the verdict of a jury. The complaint alleged that on or about the 12th day of April, 1857, in the city of New York, the defendant falsely and maliciously, without any just cause or provocation, arrested or caused to be arrested, the plaintiff in the public streets of said city, and forced and compelled him, the plaintiff, to be taken through divers public streets of said city, in charge of a policeman, who acted under the

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charge, instigation, and direction of the defendant, to a certain police office in said city, known as the Tombs, or City Prison; and that, at the instance, and upon the said malicious and false charge of the defendant, the plaintiff was kept and detained in prison, without any reasonable or probable cause whatever, and contrary to the laws of the state, and against the will of the plaintiff, whereby he was unjustly exposed and injured in his character, credit and circumstances, and was hindered and prevented from performing his necessary affairs and business, and was put to great expense by means whereof, &c.

The defendant, by his answer, denied all the material allegations of the complaint; and for a further answer, he denied that he caused the plaintiff to be arrested falsely and maliciously. On the contrary, he averred, that he was, at the time of said arrest, the president of the Farmers' Bank of Wickford, in Rhode Island; that he was a director of said bank; that he was also liable and bound for a large amount for the debts of said bank. And he alleged that the plaintiff was a large stockholder in said bank; that he had irregularly and without adequate security, procured a large amount of the circulating notes of said bank; that, at the time set forth in the complaint, the defendant had reason to suspect and believe, and did believe, that the plaintiff had in his possession and control, the circulating notes, and also some of the assets of said bank, procured by fraud and unlawfully, and the use of which by him would tend to the loss and discredit of the said bank, and of the defendant in his said relations; that the movements and actions of the plaintiff were so suspicious and extraordinary, that the defendant was advised by a public police officer of the city of New York, that there was reason to suspect him of having committed a crime, and to be desirous of avoiding detection. Under these circumstances, the defendant acting according to his convictions of what was his duty in the premises, did request the officer to arrest the plaintiff. He averred that this was done quietly, and

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w thout attracting public observation. He further averred, that he went, after a short interval, to the police court to attend to the matter, and that he found that the plaintiff had already been discharged, after a very short detention, and no actual imprisonment. He denied that he was actuated by malice, and he denied that the plaintiff sustained any damage. He also denied that he caused the plaintiff to be arrested without probable cause.

On the trial, the counsel for the defendant moved to dismiss the complaint, on the ground that the same did not contain facts sufficient to constitute a cause of action. The motion was denied, and the defendant excepted. It was proved that the plaintiff was arrested on Sunday morning, April 12, 1857, in Broadway, in the city of New York, at about half past six to seven o'clock, by a public officer, and that he went from there to the Police Court in Centre street, stopping a little while at the Astor House to see a friend ; that he remained there some time, no one appearing to make a complaint against him ; that he was required to appear at a subsequent hour—ten o'clock ; that he did appear at that time, when, no one appearing to make a complaint against him, he was discharged, after being required to give his name and address, and to pass his word that he would appear there if required.

The plaintiff was sworn in his own behalf, and testified : "I live in Boston ; am a shipping merchant ; have known defendant since the fall of 1855 ; he was president of the Farmers' Bank of Wickford, Rhode Island ; he lives at that place. I left Boston for New York on Saturday afternoon, April 11th, 1857 ; went from Boston to Stonington by rail road ; took the steamboat from Stonington to New York ; arrived at New York, near the Battery, between six and seven o'clock, Sunday morning, April 12th. I first saw defendant during that journey at Providence. I next saw him on the boat, a short time after the boat started ; we shook hands together, and had some five or ten minutes conversa-

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tion ; the next I saw of him was on Broadway, on Sunday morning between six and seven o'clock, soon after arriving. I was walking alone, on the west side of Broadway, nearly opposite the head of Wall street ; a stranger came up to me ; put his hand on my shoulder ; saw defendant about five seconds afterwards ; he was standing five feet from me at the time. The stranger said, I must arrest you. I asked, for what ; he said, for robbery. I asked, robbery of what ; he said a bank in Rhode Island ; I replied, he must be mistaken ; he said, no, I am not ; and said, turning round, there is the man by whose orders I arrest you ; it was the defendant, Mr. Chadsey. The defendant then stepped forward and said, he has the money in his carpet-bag, reaching hold of my carpet-bag, which I then held in my hand. I remarked, if there was money in my carpet-bag it was unknown to me, and took the keys out of my pocket, unlocked the bag, while standing in the street ; both the defendant and the officer examined it, and put their hands into it ; defendant said to the officer, "take him in charge." I asked the officer what was to be done ; he said he should be obliged to take me to the Tombs. We then went, at my request, to the Astor House, where I wished to see a friend ; the officer went with me ; we remained at the Astor House a few minutes ; then went to the Tombs, (so called ;) I mean the police office, in Centre street ; remained there about an hour with the officer ; the officer's name is Hill ; I was discharged about eleven o'clock that morning ; after I had been in the police office some time, I went away with the officer ; returned at the adjourned sitting of the magistrate, either at 10 or 11 o'clock, I forget which hour. While at the police office, I saw the defendant there, in the vestibule, at the entrance ; he was with another person, also an officer ; a crowd of people gathered round when my bag was examined in Broadway ; nothing was taken from the bag ; the defendant did not go to the police office ; he immediately left me upon my arrest." The

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witness designated officer Hill, present, as the stranger who arrested him.

The following check was shown to the witness :

“\$2500 Dolls. BLACKSTONE BANK, Boston, Dec. 26, 1856.
Pay to A. C. Collins, cashier, or order, twenty-five hundred dollars.

No. 5310. To the Cashier.

(Signed) CHARLES S. BROWN.”

The question was asked, who drew that check? Answer, “I did.” Question: Has it ever been paid? The plaintiff’s counsel objected. Question overruled, and the defendant’s counsel excepted. The counsel for defendant then stated, in answer to the inquiry of the court, as to what was intended to be proved, that it was intended to be shown that the check in question, and another one of the like amount, were given on the day of the date of said check, by the plaintiff to the defendant as president of the Farmers’ Bank of Wickford, R. I., and that the plaintiff represented to him, at the time that they were good checks, and drawn against funds of the plaintiff in the banks upon which they were drawn, and would be paid upon presentment; and that upon the strength of said representations, he obtained \$5000 of the bank bills of said bank, which the plaintiff used and put into circulation, and which the bank redeemed; and that in fact, such representation was false, and that the plaintiff had no funds in the banks upon which said checks were drawn, and never had had, and never kept an account in either of them. The court overruled the offer, and decided that such evidence was improper. Exception.

Robert Hill, the police officer by whom the plaintiff was arrested, testified that about half past six on the Sunday morning in question, he was on the Battery and was sent for from the Stonington boat, to arrest a man, and went; saw the defendant on the gangway of the boat; pointing to Brown, he said to me, “Could not you arrest him on suspicion?” “On suspicion of what?” says I: “Suspicion of robbing a

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bank in Rhode Island," he said ; I then distinctly asked him if he would charge him with robbing a bank ; he did not then say any thing to that. I told him, however, positively, that I would not arrest him, unless he would charge him positively with this offense ; I told him what the consequences would be as I understood it ; we started off to follow the plaintiff ; while we were following him, the conversation was of about the same import, until I arrested him, just before we got to Maiden Lane, in Broadway. I told the defendant I would not have any thing to do with the matter until he made a proper charge, something tangible ; he then said, take him in charge for robbing a bank in Rhode Island ; I forget the name of the bank, exactly ; I then tapped the plaintiff on the shoulder, and told him he was a prisoner."

The plaintiff having rested his case, the counsel for the defendant moved to dismiss the complaint, or for a nonsuit, on the grounds that there was a failure to make out the case stated in the complaint, or any case whatever ; that no cause of action was made out against the defendant ; that there was no proof that the arrest was made by him, or that he caused it to be made, or that the officer Hill was bound to make it, or was authorized to do so ; that there was no proof of want of probable cause for the arrest, or the acts of the officer, or of Chadsey ; that there was no proof of malice, nor of damages ; and that if the defendant could be considered as acting at all in the matter, it must be as in aid of the officer, and that the acts of the officer were not binding on Chadsey ; nor was he answerable for them, even though Chadsey stated to him that which was sworn to ; and that nothing that was said or done by Chadsey empowered or authorized Hill to arrest him, and he had no right to do so therefor ; and that no damages were proved to have been sustained by the plaintiff. The justice denied the motion, and the defendant's counsel excepted. The counsel for the defendant then called the defendant as a witness in his own behalf, and offered to prove by him the circumstances

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under which the plaintiff obtained the money from the Farmer's Bank of Wickham. The court excluded the testimony. The counsel for the defendant stated that he had also other witnesses in court to prove the facts to be elicited by this course of inquiry. But the court ruled that it could not be admitted, from any source. To which the counsel also excepted.

The testimony on both sides being closed, the counsel for the defendant renewed his motion for a nonsuit, or for judgment for the defendant, of dismissal of the complaint, on the grounds aforesaid; and that it was clearly proved that the defendant did not cause the arrest of the plaintiff; and that there was sufficient probable cause for his arrest, even if he did cause it. Motion denied, and the defendant excepted.

The jury found a verdict in favor of the plaintiff for \$2000, and the defendant appealed from the judgment.

S. Sanxay, for the appellant.

G. T. Jenks, for the respondent.

By the Court, EMOTT, J. We are of opinion that the damages in this case are excessive, and that a new trial was improperly refused at the special term, and must now be granted, for that reason. The jury could hardly have regarded the sum found by them as the measure of the injury sustained by the plaintiff. Their verdict went farther than to give compensation for his wrongs, and was no doubt intended to inflict punishment upon the defendant for his conduct. They had a right, in such a case, to give damages for such a purpose, but not to an arbitrary amount. Two thousand dollars was an unreasonable verdict, even upon the facts which appeared at the trial. We might indeed feel some reluctance to interfere on account of the damages, were it not for the additional consideration that evidence was withheld from the jury, which would have been proper to explain the

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motives of the defendant, and probably would have mitigated the verdict against him.

Before coming to this point, however, it will be necessary to consider briefly the general character of the plaintiff's action, and the rules by which it should be tried. We are by no means convinced that any of the exceptions taken at the trial are well taken, except perhaps the exception to the refusal of the evidence which we have already mentioned; and this evidence was offered in a manner to make its reception very doubtful, and which was exceedingly likely to mislead the judge. The case was tried in a confused way, which no doubt did mislead both the court and the jury, and probably has resulted in doing injustice which may be remedied upon a new trial.

The complaint charges the defendant with having falsely and maliciously without any just cause or provocation arrested or caused to be arrested the plaintiff; and proceeds to allege the circumstances of the arrest and detention and the special or particular damage thereby. An action will lie against one who has either unlawfully arrested or imprisoned another, or who has falsely, that is unjustly and maliciously, prosecuted him and caused his arrest. But these are different actions, requiring different pleadings and evidence, and governed by different rules. Under our former nomenclature, the action for unlawfully arresting or imprisoning another was trespass; while for maliciously prosecuting another, or causing or procuring his arrest, it was an action on the case. The former was the action for false imprisonment; the latter for a malicious prosecution or malicious arrest. In the latter two cases the action was substantially the same, and was governed by the same rules, whether the injury complained of was a prosecution or an arrest. The arrest might be the only act of prosecution, and the only act procured by the defendant. Or, there might be an unlawful and malicious arrest in the course of a lawful prosecution; as where a creditor arrests his debtor for a demand upon which he cannot be im-

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prisoned, or for more than is due, or where he is exempt from imprisonment.

But whether the injury complained of was a prosecution, that is, the institution and pursuit of a civil or criminal proceeding, or merely an arrest and detention, the action was the same, being brought upon the case, and varying in the pleadings and proof with the special circumstances. In all such cases, however, whether the injury is a prosecution or an arrest merely, the rules applied by the courts are uniform and settled. The plaintiff must invariably aver and prove both malice and a want of probable cause. (*Mitchell v. Jenkins*, 5 B. & Adol. 588. *Whalley v. Pepper*, 7 Carr. & Payne, 506. *Walker v. Cruikshank*, 2 Hill, 297. 1 Arch. N. P. 446.) And it is a part of the want of probable cause, and an indispensable matter both of averment and proof, that the prosecution or arrest should be shown to have been terminated. The cases in which this rule has been sedulously applied to actions for malicious prosecution, as by indictment, are very familiar. The same rule obtains in actions for malicious arrests, although of course the same formalities are not required to terminate an arrest, as to put an end to a prosecution. But that the principle is the same see Buller, J. in *Morgan v. Hughes*, (2 T. R. 231;) *Wilkinson v. Howell*, (1 Moody & Malkin, 495.) In the latter case the rule was distinctly stated, in an action for an arrest, by Lord Tenterden, and approved by all the judges of the king's bench.

The action for falsely and unlawfully imprisoning another proceeds upon a totally different principle. That is an action of trespass for a direct wrong, in which the defendant must have personally participated. This is one distinction from the action on the case for maliciously procuring an arrest or instituting a prosecution. Another is that the action of trespass for false imprisonment is for having done what upon the statement of it is manifestly illegal; while the ground of the action for a malicious arrest or prosecution is the procuring to be done what upon the face is or may be a legal act,

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from malicious motives and without probable cause. This distinction is clearly stated in the reasons for the judgment in *Johnson v. Sutton*, in the exchequer chamber, as given by Lord Loughborough and Lord Mansfield and reported in 7 *T. R.* 544. The farther distinction resting upon the indirect procurement or the direct participation of the defendant in the act, is well illustrated in a case which is very pertinent to the circumstances of the case at bar. The case is *Hopkins v. Crowe*, (7 *C. & P.* 373,) an action for false imprisonment, tried before Lord Denman, and in which his rulings were afterwards sanctioned, on argument, by the court of king's bench. The plaintiff was arrested by an officer, in the presence and at the complaint and instigation of the defendant, who was a private person, for ill using a horse. The rule given to the jury was that if the defendant directed the officer to take the plaintiff into custody, he was liable to an action for false imprisonment, but if he merely made his statement, leaving it to the officer to act or not as he thought proper, he was not liable to an action of trespass for the arrest.

It is obvious that these two classes of wrongs and remedies require different rules both of pleading and evidence, and are essentially distinct. In an action for false imprisonment, the gist of the action is an unlawful detention. Malice in the defendant will be inferred, so far at least as to sustain the action, and the only bearing of evidence to show or disprove actual malice is upon the question of damages. So, also, probable cause, or reasonable grounds of suspicion against the party arrested, afford no justification of an arrest or imprisonment which is without authority of law. There are some cases in which the existence of reasonable ground of suspicion is spoken of as a defense in actions for false imprisonment; but upon examination it will be found that these cases turn upon the authority given to magistrates in particular instances to arrest upon suspicion merely, to prevent or punish crimes, and in which therefore a reasonable suspicion is a sufficient authority and justification for an arrest; or else they are cases

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in which the actual commission of a felony was first proved, and the case turned upon the ground for suspecting the person arrested. (*See West v. Baxendale*, 9 Com. Bench Rep. 141.) In the case of an arrest by a private person, there can be no justification and no defense to the action, unless it first be shown that a felony has been actually committed by some one, and that there were reasonable grounds to believe that the person arrested was the guilty individual. (*See Samuel v. Payne*, Doug. 358; *Holley v. Mix*, 3 Wend. 350.) Under our present system of practice such a justification must be pleaded specially; and the answer must begin by showing the actual commission of an offense, and then the cause to suspect the plaintiff of its commission. If as much as this is not pleaded, or if the evidence comes short of this, it can only go to the question of damages.

In an action for a malicious prosecution, on the other hand, it is not necessary that the prosecution or the arrest should have been unlawful or unjustifiable upon its face, but it must have been malicious, and without probable cause. Malice and want of probable cause are the gist of the action, and must be both stated and made out.

The complaint in this action was vicious as a pleading, because it stated two causes of action belonging to these two distinct classes, in one count, coupled by a disjunctive. If this fault in the complaint had been corrected before the issue was joined, much of the confusion which has ensued would have been prevented. The complaint, upon examination, will be seen to be radically defective as a complaint for a malicious arrest or prosecution, inasmuch as it does not aver that the arrest or prosecution is at an end; nor how it was concluded. The action must therefore be treated as for false imprisonment, and does not involve any question of probable cause, unless it be brought in by the answer.

But the allegations of the answer do not make that issue material to the right of the plaintiff to recover. The answer does not allege the commission of a felony by any one, and

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therefore there is no justification pleaded. The only issue tendered is the general denial, which goes merely to the fact of an arrest and imprisonment, and the defendant's participation in it. All the remaining statements of the answer are statements of evidence, receivable only in mitigation of damages, and would probably have been stricken out upon motion.

It may be said that the defendant is liable for causing an unlawful detention of the plaintiff, although he did not personally take part in it. If this were so, and were material to the present action, it could not affect the rules by which the case should be tried; since no appearance of probable cause would justify a wholly unlawful detention of the plaintiff, such as this is alleged to have been. And if the defendant took any part in an unlawful imprisonment of the plaintiff, he became a principal in the act, and is liable for the trespass upon the plaintiff's person. While if he merely communicated facts or circumstances of suspicion to the officers, leaving them to act on their own judgment and responsibility, he is not liable at all, in this action, in any aspect of it.

The latter version is that given by the defendant himself, and if it be true he should have had a verdict; while if he went beyond this and directed and participated in the plaintiff's arrest, being present himself at the time, he is clearly liable here for false imprisonment.

The counsel for the defendant excepted to portions of the charge, stating as his objection that the judge left it to the jury to say whether the defendant had probable cause for the arrest of the plaintiff. The objections were founded, as the whole defense seemed to have been conducted, upon the idea that the question of probable cause was material, and that the judge should have decided it himself. Undoubtedly if it were material to determine whether the defendant had probable cause for arresting the plaintiff, that would be a question of law, upon undisputed facts. But it was not material in the present case, and the exceptions are not available. They were not distinct enough to bring the real point in the case

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to the notice of the judge at the trial; nor do they bring it before us.

As these pleadings stand, the only questions in the case are the fact of the arrest and detention of the plaintiff, the defendant's participation in it, and the damages. There is no justification pleaded, and no grounds of suspicion can do more than remove or weaken the imputation of malice, and mitigate the damages.

But we think, as has already been intimated, that the judge at the trial should have received evidence to show grounds for suspecting the plaintiff of the commission of a crime, although its actual commission was not averred, nor very clearly offered to be proved.

The evidence was apparently offered as a justification, and was properly rejected for that purpose. But the facts offered, or some of them, if proved, would go to relieve the defendant from the imputation of having acted from merely malicious, or mischievous and wicked motives, which imputation must have led to the present verdict. Evidence of the plaintiff's conduct, and the circumstances of suspicion against him, was proper upon the question of damages only; but upon that point it was material, and the absence of any explanation or excuse has probably enhanced the verdict, and led to injustice.

Upon the whole we are all of opinion that this judgment should be reversed and a new trial ordered, the costs to abide the event.

[KINGS GENERAL TERM, February 9, 1863. *Emott, Lott and Brown*, Justices.]

THE PEOPLE, *ex rel.* Knox and others, *vs.* THE VILLAGE OF
YONKERS.

Where the trustees of a village, having determined to grade an avenue and build a bridge thereon, over a river, proceeded to establish the district of assessment, procured plans and specifications for the work and advertised for proposals from contractors, and at a meeting of the board, held on the 8th of November, 1860, the proposals were opened, and the contract awarded; they having first amended the specifications, so as to extend the time for the completion of the work; *Held* that such extension of the time did not have the effect to vitiate all the proceedings.

A provision, in a village charter, that the proposals for constructing a public work shall be opened on the day named in the notice, "or upon such other day as the trustees may adjourn to, for that purpose," is directory merely. It is not essential that the time for opening and looking at the proposals shall be continued by regular adjournment from time to time.

The trustees are to open the proposals, and accept that which is most favorable. This they may do at the day mentioned in the notice, or at the adjourned day, or at a day to which they had not adjourned (if the adjourned meeting fail to take place.)

Ordinarily, the combination in one proceeding of improvements so dissimilar in their natures as the grading of a street and erecting a bridge thereon, and the construction of a sewer, would be vicious in principle. But where the sewer is a part of the bridge, having no other purpose to serve than to relieve the same from the effect of the water which collects upon the surface of the street, no valid objection exists.

The power of commissioners, in a street assessment, extends only to known, ascertained and fixed expenses. All others are illegal and void.

Accordingly, where the estimate of the expenses of an improvement, after enumerating specifically various items, amounting in the aggregate to \$1216.74, contained a charge of \$460.05 for "*contingencies*;" *Held* that the insertion of this item rendered the assessment illegal and void.

THIS case comes up on return to a certiorari, brought to review the proceedings of the trustees of the village of Yonkers, in respect to grading the extension of Warburton avenue and building a bridge thereon, over the Neperhan or Sawmill river, in said village. At a special meeting of the board of trustees of the village, duly called and held June 28, 1860, at which the president and all the trustees were present, a petition of nine citizens was presented, praying that the proposed work be put under contract and completed. The

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petition was referred to the street committee. At the regular meeting September 3, 1860, the street committee reported plans and specifications for the proposed work, with a description of a proposed assessment district, and a resolution to advertise for proposals to do the work. Action upon the report was postponed to an adjourned meeting, September 17, 1860. At the adjourned meeting, Sept. 17, 1860, the report was referred back to the street committee. The regular meeting held October 1, 1860, was adjourned to October 8, 1860, at which last meeting the street committee presented an amended report, as to the assessment district, which was adopted. This meeting adjourned to October 22d, but no meeting was held on that day, for want of a quorum. The trustees, on October 8, 1860, caused a notice of the assessment district, and for proposals to be made, and that they would act thereon on October 29th, 1860, to be published in the village papers. At a special meeting held October 29, 1860, in consequence of remonstrances, notices were ordered for citizens to present petitions and remonstrances, and action was postponed until the next regular meeting, November 5, 1860, which meeting fell through for want of a quorum, and a special meeting was immediately called by the president. At the special meeting, November 8, 1860, various petitions and remonstrances were presented and the five sealed proposals for the work which had been received by the clerk were opened. The specifications were adopted, the work ordered to be done, and Cahill & Morgan's proposals were approved and accepted, and William Radford, Bailey Hobbs and A. W. Doren were appointed commissioners of assessment, at this meeting. The counsel for the board was also directed to prepare a contract for the work, which he did, and it was afterwards executed by the village and by Cahill & Morgan, the contractors, and their sureties. The commissioners of assessment having first been sworn, proceeded to make an assessment upon the property included in the assessment district, and at the regular meeting held February 3, 1862, they pre-

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sented their communication, and a majority report signed by Messrs. Bailey and Hobbs, and a minority report signed by Mr. Radford. The report was referred to a special committee of three trustees, and on February 10, 1862, said committee presented a majority report in favor of confirming the majority report of the commissioners of assessment, and a minority report against confirmation. The board confirmed the majority report of the commissioners of assessment, and ordered notices to be published for parties assessed to pay their assessments to the treasurer. Notice was published pursuant to the resolution of the board, and a large portion of the assessments were voluntarily paid before the writ was issued, and the bridge was completed and is in daily use.

The authority of the village to levy and collect assessments is given and regulated, and the mode of proceeding is prescribed by its charter. (*Laws of 1857, ch. 667, tit. 5, §§ 2, 3, p. 676, §§ 21 to 27 inclusive, pp. 684, 685, 686, as amended by Laws of 1860, ch. 366, p. 615.*)

The relators objected to the assessment in question as being illegal and void on the general grounds of failure on the part of the trustees and the persons appointed as commissioners to conform to the statute, and on the ground of evident injustice in the assessment itself.

J. M. Van Cott, for the relators.

Edward Wells, for the defendant.

By the Court, BROWN, J. This is a common law certiorari, brought to review the proceedings of the trustees of the village of Yonkers, in respect to the grading the extension of Warburton avenue, and building a bridge thereon over the Neperhan river in said village. Riverdale avenue runs from the south bounds of the village north to the south bank of the river. Warburton avenue commences at the north bounds of the village and runs in a southerly direction to the Neper-

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han, and across the same to its south bank. This river runs westerly to the Hudson, dividing the village, and the intended effect of the contemplated bridge was to connect the two parts of the village by a line of communication from the southern to the northern bounds thereof. The trustees proceeded to establish the districts of assessment, procured plans and specifications for the work, and advertised in due form for proposals from contractors. They opened the several proposals and awarded the contract. The commissioners of assessment were appointed, who proceeded to make the assessment upon the lands charged with the payment thereof. Various objections were taken upon the argument to the proceedings of the trustees and the commissioners, some of which I will proceed briefly to notice.

At a meeting of the board of trustees, held on the 8th of November, 1860, the proposals were opened and the contract awarded at that time. But before this conclusion was reached the specifications were amended, upon the motion of Mr. Wheeler, so as to extend the time for the completion of the work to the 1st of November, 1861. This is thought by the counsel for the relator to have been an error, because no notice referring to such amended specifications had been or could have been published as required by the charter. We have no means of determining what effect this limitation may have had upon the contract. It may or may not have been beneficial to the contractor and in a corresponding degree prejudicial to the landowner. As the trustees would necessarily have had power to extend the time for the completion of the work after the contract was executed, we do not think such an extension at the time of opening the proposals had the effect to vitiate all the proceedings. The enlargement of the time was not unreasonable in its length, and could not be considered as affecting materially either the interests of the contractors or the landowners. In this respect there was no sensible or material departure from the directions of the act under which the proceedings were had.

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Another exception, taken by the counsel for the relator, refers to the time for opening the proposals of the contractors. This was fixed for the 29th October, 1860. It was postponed to the 5th of November by regular adjournment of the board of trustees. This meeting failed to take effect. On the 8th of November the board assembled and the proposals were opened. The direction that the proposals shall be opened on the day named in the notice "or upon such other day as the trustees may adjourn to for that purpose," is directory merely. It cannot be deemed essential that the time of opening and looking at the proposals shall be continued by regular adjournment from time to time like the continuances upon the judgment roll of a court of record. The trustees do not expect to hear an argument upon the policy or propriety of awarding the contract to the author of this or that proposal. They are to open the proposals and accept that which is the most favorable. That is all. This they may do at the day mentioned in the notice, or at the adjourned day, or at a day to which they had not adjourned (if the adjourned meeting fail to take place) and no one be prejudiced. The provision is therefore merely directory, because the trust is as well executed in the one form as in the other.

The next objection of the relators which I propose to consider is that against uniting the improvement for the street and the bridge with that for the sewer. The latter class of urban improvements being made for the purpose of drainage alone, are needed for the benefit of some lands and not for others, while the construction and grading of a street would be beneficial to all, whether they were wet or dry lands. Usually the combination in one proceeding of improvements and assessments therefor so dissimilar in their nature would be vicious in principle. In the present case, however, the sewer is a part of the bridge, having no other purpose to serve but to relieve the south abutment thereof from the effect of the water which collects upon the surface of the street. The work is the improvement of Warburton avenue so as to con-

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nect it with Dock and Main street. This includes the bridge over the Neperhan, and the south abutment thereof, in which is the sewer. It is therefore a part of the bridge and not open to the relator's objection.

The aggregate amount of the expenses of the improvement to be distributed and assessed upon the property charged is \$12,116.74, made up of eleven different items which are set out in the return to the writ. To seven of these items or specific charges the relators take exception as illegal and unjust. I shall notice but one of them—the charge of \$460.05 for contingencies. It is to be remembered that assessments for urban improvements are proceedings which take the property of individual citizens and appropriate it to the public uses. It is a proceeding in derogation of the common law, and the power to be exercised must be strictly pursued. The trustees of the village of Yonkers may take the property of its citizens to make and to grade and improve a street, but the authority given by the charter to effect this object must be followed to the letter, or the proceedings will fail. They cannot take private property for any other purpose. The uses to which the money or the property taken is applied must be legitimate uses, such as the constitution and the law upholds and authorizes, and no other. These uses in the present case are indicated in items of expenses or specific charges to which I have referred. They are the compensation to the contractor, the surveyor or engineer, the printer, the clerk, the treasurer, inspector, and the commissioners and counsel. These are known expenses, payable to the persons named in the estimate. The equivalent therefor is also known, and the citizen whose money is taken sees and knows to whom and for what it is appropriated. But what shall be said of the charge of \$460.05, for contingencies? For what purposes, and to whom, is that sum payable? What equivalent benefit will the tax or assessment-payers obtain for that? How came this sum to be exactly \$460.05? Why may it not have been ten times more or ten times less? If the commis-

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sioners have power to fix it at one sum, in their discretion, they may also fix it at another. And what security will there be for property, in the village of Yonkers, if the commissioners of assessment may fix at their pleasure the sum which the landowners are to pay for a given improvement? Surely a moment's reflection will suggest that the rights of property do not rest upon so infirm a basis. What is meant by contingencies? As the charge is found in an estimate of the expenses of improving Warburton avenue, I infer that thereby is intended contingent expenses—expenses which the commissioners could not ascertain—expenses which were unknown, which were uncertain, and which might or might not be incurred thereafter. A contingency is a fortuitous event which comes without design, foresight or expectation. In law a contingent remainder is a remainder depending upon an uncertainty. And so a contingent expense must be deemed to be an expense depending upon some future uncertain event. The power of commissioners in a street assessment extends only to known, ascertained and fixed expenses, and all others are illegal and void. Before the commissioners enter upon their duties, the surveys and examinations are completed and the contracts for the work are made. All the costs and expenses of the improvement can and should be ascertained. If the statute has effect and its directions are executed, no part of the expense is left to depend upon future events. In legislative or municipal bodies, having a treasury and money of their own at their disposal, they may safely make appropriations for contingencies, because if the sums thus appropriated are not used they necessarily return again to the source from which they were taken. But if this sum of \$460.05 is not needed for the improvement; if the contingencies referred to in the estimate never happen, there is no process by which it can be returned to the landowners from whom it has been taken. It is not needed for the uses of the street, and therefore its insertion in the estimate of expenses is illegal and void. I have said nothing of the abuses

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to which such a system of assessment in a large and growing village must inevitably lead, but have chosen rather to rest my objections to it upon reason and principle.

The proceedings must be reversed, with costs.

[KINGS GENERAL TERM, February 9, 1863. *Emott, Brown and Lott*, Justices.]

 SCRANTON & OTIS vs. CLARK.

In this state, the rule of *caveat emptor* which obtains in the common law, is subject to the exception that a warranty of title in the vendor is implied in a contract of sale. But this exception is limited to cases where the vendor is, at the time, in the possession of the thing sold.

The possession of the vendor is the foundation of the implied warranty.

Where J. made a contract to sell the promissory note of C. to L. when he was not its owner, and it was not in his possession; *Held* that the purchase was at the risk of L.; and the law implied no warranty by J. that he had the title to the note; and that although J. subsequently acquired the title, this did not enure to the benefit of L., and render a payment by C. to L. good and effectual, and an extinguishment of the note.

THIS was an appeal by the plaintiffs from a judgment rendered at the circuit, after a trial by jury. The action was brought upon a promissory note, made by the defendant, dated October 18, 1855, and payable to E. B. Litchfield, or order, for the sum of \$2673.37, one year after date. It was claimed by the defendant, that on the 8th day of November, 1858, the note belonged to one A. G. Jerome, and was in his possession; that he sold it to W. W. Leland, and that it was paid by the defendant to Leland. The plaintiff claimed that the note did not belong to Jerome at the time of the sale to Leland, but belonged to E. C. Litchfield, and was in his possession; that E. C. Litchfield afterwards, on settlement of accounts, transferred it to Jerome, who sold it to E. B. Litchfield, and by whom it was transferred to the plaintiff. Among other things, the judge charged the jury,

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1. That if Jerome was the owner of the note in 1858, when it was said he sold it to Leland, and he did so sell it, but did not deliver it, then the note was paid, and the plaintiffs could not recover. 2. That if Jerome was not the owner of the note in 1858, at the time he was said to have sold it to Leland, and he did so sell it, and he afterwards became the owner of it, then if Clark had paid it to Leland, who had purchased it, the plaintiffs could not recover, because Jerome must be deemed to have warranted the title, and if he acquired the title after a sale to Leland, it then became extinguished by operation of law. To the second proposition the counsel for the plaintiffs excepted. The jury rendered a verdict for the defendant.

J. W. Gilbert, for the appellants. I. The verdict should be set aside, upon the ground that it is decidedly against the weight of evidence; and a new trial should be granted. (*Jackson v. Sternbergh*, 1 *Caines*, 162.)

II. The charge was erroneous: 1st, in submitting to the jury the question whether there was an *actual* sale of the note; 2d, in the instruction that a vendor *not in possession* warrants the title; and 3d, in applying the doctrine of estoppel by force of the *covenant* of warranty to defeat the plaintiff's right to recover. 1. It is clear from the evidence, that at the time of the trade with Leland, *Jerome had neither the title to, or the possession of the note*. He could not, therefore, make a *valid sale* of it. The only exceptions to this rule, even when the vendor is in possession, are sales in market overt, and the one under the Mosaic law. (*Exodus* 22, 1.) His liability then, would depend on the *agreement* between him and Leland, or upon his *fraud*, if any were practised. (*Robinson v. Anderton*, *Peake*, 94. *Early v. Garrett*, 9 *B. & C.* 932.) 2. The transaction was an *exchange of land for a batch of notes*, and not a *sale*. And if Jerome incurred any liability, it arose because he affirmed that the note in suit was among those exchanged. (*Sedg.*

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on Dam. 295.) But no proof was given of any statement made by Jerome on the subject at the time of the exchange.

3. Promissory notes can be transferred only by written indorsement or assignment, or by delivery. (1 *R. S.* 768, § 1. *Stat. 3 and 4 Anne*, 2 *Ev. Stat.*, part 3, ch. 4, No. 2. *Minot v. Gibson*, 1 *H. Bl.* 569. 1 *Pars. Cont.* 204.) No warranty arises where the surrounding circumstances show that no warranty was intended. (*Story on Sales*, § 367, a.)

4. No implied warranty arises upon the sale of a chattel, when the seller is out of possession, and no affirmation of title is made. (*McCoy v. Archer*, 3 *Barb.* 323, and cases cited. *Edick v. Crim*, 10 *id.* 445. 2 *Kent's Com.* 478. 1 *Pars. on Cont.* 458. *Hopkins v. Grinnell*, 28 *Barb.* 537.)

5. But if there was an implied warranty by Jerome of his title to the note, no such effect can be given to it as is asserted in the charge. (a.) A warranty can work an estoppel only in conjunction with an actual conveyance. In other words, it requires an estate, rightful or wrongful, to support it. (2 *Trask on Real Prop.* 476, § 41. *Seymour's case*, 10 *Co.* 96. *Rawle, Cov. for Tit.* 405–436.) See also *Delaware Bank v. Jarvis*, (20 *N. Y. Rep.* 230.)

(b.) And it requires an express covenant of warranty to create an estoppel. (*Jackson v. Wright*, 14 *John.* 193. *Pelletreau v. Jackson*, 11 *Wend.* 110. *Edwards v. Varick*, 5 *Den.* 665. 1 *R. S.* 738, § 140. 2 *Smith's Lead. Cas.* 460, *Am. note.* 1 *Cow.* 616. 4 *Wend.* 622–300.)

(c.) A warranty would not have the effect to divest a title acquired from the original grantor, by a bona fide purchaser, who should be entitled to the protection of the recording acts. (*Rawle, sup.*) For the same reason, it cannot be extended so as to divest the title of the transferee of a promissory note, even though he receives it after maturity. The effect of an estoppel is to make an after acquired title enure to the benefit of the original grantee, not to extinguish the subject of the grant. To work an extinguishment, Leland, Clark and Jerome should be parties, so that a judgment would be a bar, so as to protect Clark

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against another action on the note, and Jerome against an action for breach of warranty. An overdue note continues to be negotiable in like manner as it was before maturity. And a *bona fide* purchaser takes it only subject to such equities and defenses as arise from the note itself, or the transaction in which the note originated, and not to any collateral matters. (*Williams v. Matthews*, 3 Cowen, 260. *James v. Chalmers*, 2 Seld. 214, 215. *Brittan v. Hull*, 1 Hilt. 528. *Pars. Mer. Law*, 101. *Code*, § 112. *Beckwith v. Union Bank*, 4 Sand. 605. *S. C.* 5 Seld. 211. 3 Kern. 622. *Edwards on Bills*, 60.) And this is in accordance with the well established rule, *that a sale without a delivery is not valid as against a third party*, without notice. For if the same thing be sold by the vendor to two parties, *by conveyances equally valid*, he who *first gets possession* will hold it. (1 *Pars. on Cont.* 441. 4 *Wend.* 300.) *A fortiori*, ought the title of the plaintiffs to be preferred, the conveyance to them being valid, and the alleged sale to Leland not having been followed by any conveyance whatever. (*Peabody v. Fenton*, 3 Barb. Ch. 462, and cases cited. *Keyser v. Harbeck*, 3 Duer, 388-391.) (*d.*) The doctrine that the obligation of a warranty of the title to a chattel runs with it so as to bind privies merely, is certainly anomalous. To constitute a breach a judgment in which the warrantor was represented, and eviction was always necessary. (1 *Smith's Lea. Cas.* 77, *Am. note.* *Vibbard v. Johnson*, 19 John. 79.)

III. The utmost relief, which upon all the facts, and according to the justice of the case, the defendant can reasonably claim, is to be put in *statu quo*, so far as he was induced by Jerome's statements to change his position, and has been injured thereby. This, if the alleged payment to Leland had been a real one, would entitle him to a deduction of \$300 and interest. But, for obvious reasons, his indorsement of that amount on Leland's note, under the circumstances, did not affect the liability of Leland to him, and he has not therefore been injured at all.

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L. S. Chatfield, for the respondent. I. The jury found that Jerome sold the note to Leland, and that the defendant paid it to Leland after he so purchased it. These were purely questions of fact, and the finding is conclusive. In any aspect of the case, the first proposition was necessary to be found, to wit: That Jerome sold the note to Leland. This is, therefore, fixed by verdict.

II. And it is immaterial whether Jerome then owned the note or not. When he sold it he warranted the title. This warranty is always implied on the sale of a chattel. (*De-freeze v. Trumper*, 1 *John*. 274. *Rew v. Barber*, 3 *Cowen*, 272. *Sweet v. Colgate*, 20 *John*. 196. *Welsh v. Carter*, 1 *Wend*. 185. *Duffee v. Mason*, 8 *Cowen*, 25. *McCoy v. Archer*, 3 *Barb*. 323. *Edick v. Crim*, 10 *id*. 445. 1 *Par. on Cont*. 457. 2 *Kent's Com*. 478.) And, if he at any time afterwards acquired title to it, the title so acquired belonged to his transferee.

III. Would the defense of Clark, that he had paid the note to Leland after the sale to him, be a good defense to an action brought by Jerome on his subsequently acquired title? Of this there can be no doubt. It is submitted that one deriving title from him (the note being dishonored) stands in his shoes, and is subject to the equities and defenses existing against him at the time of the transfer. A good defense against Jerome would be a good defense against all subsequent holders. (*Williams v. Matthews*, 3 *Cowen*, 252. *De Mott v. Starkey*, 3 *Barb. Ch*. 403. *Reed v. Warner*, 5 *Paige*, 650. *Comstock v. Hoag*, 5 *Wend*. 600. *Ehle v. Judson*, 24 *Wend*. 97. *Lansing v. Lansing*, 8 *John*. 454.) Again; Jerome promised to deliver it to Clark, if found. That promise binds all who claim through him.

IV. A warranty of title to realty carries a subsequently acquired title by the grantor over to the grantee *ex pro,ria vigore*. Such title enures to the benefit of the grantee, with warranty. The *principle* is precisely the same when applied to the sale of personal property. It is that a man shall not

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sell a thing and keep it in hostility to his grantee, whatever may be the pretext ; so that if he has not title when he sells, but afterwards acquires it, the new title belongs to the grantee. (*Jackson v. Bull*, 1 *John. Cas.* 81, 90, 91. *Jackson v. Stevens*, 16 *John.* 110. *Jackson v. Hubble*, 1 *Cowen*, 613. *Van Horn v. Crain*, 1 *Paige*, 455. *Jackson v. Winslow*, 9 *Cowen*, 13. *Sweet v. Green*, 1 *Paige*, 473. *Vanderheyden v. Crandall*, 2 *Den.* 9. *Bank of Utica v. Mersereau*, 3 *Barb. Ch.* 528. *Rathbun v. Rathbun*, 6 *Barb.* 98.)

V. The charge of the court was therefore right, and the verdict should be sustained.

By the Court, EMOTT, J. The note upon which this action is brought was never, at any time, in the possession of W. W. Leland, to whom the defendant alleges that he paid it. Whether it was in the possession of Jerome, from whom Leland claims to have received it at the time when the transaction occurred, in 1858, in which the defendant insists that Jerome transferred the note to Leland, and whether Jerome then owned the note, are questions upon which there was, to some extent at least, a conflict of evidence at the trial. The note was made October 16th, 1855, by the defendant, Clark, payable to the order of E. B. Litchfield, one year after date, and it has been indorsed by the payee in blank without recourse. E. B. Litchfield, the payee, it is admitted transferred the note to Jerome before its maturity. In 1858, in the latter part of the year, but at what particular time is not stated, Jerome made an agreement with W. W. Leland to exchange certain promissory notes for some lands in Iowa. This agreement was carried into effect, Jerome receiving a conveyance of the land from Leland, and Leland a transfer of the notes from Jerome. This transfer imported or included a delivery of whatever notes were exhibited at the time ; for since these notes were, so far as appears, indorsed in blank, or otherwise transferable by delivery, and were produced to Leland, and by him left with Jerome as his agent

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or depository, they were in law and in fact delivered to Leland.

The judge charged the jury that if Jerome was the owner of the note in question, in 1858, when he sold it to Leland, and he did so sell it but did not deliver it, yet the payments subsequently made by the defendant to Leland were good, and extinguished the note. As a proposition of law, upon the facts stated, this instruction is perfectly correct, but I am at a loss to see how, upon the evidence in the case, a jury could come to the conclusion that Jerome in 1858 was the owner of the note and sold it to Leland, but did not deliver it. The statement of the transaction by Leland, as I have already said, imports and includes a complete and effectual transfer of the note by Jerome. It is a cardinal feature of his story that the note in question was exhibited to him by Jerome during the negotiation. The evidence of Jerome and Litchfield, on the other hand, denies not only the sale of the note to Leland but the possession of the note by Jerome in January, 1858. The jury might have believed Leland and have come to the conclusion that Jerome sold and delivered the note to him, although he was not the owner, but they could hardly have believed Leland's story of the transfer without believing that the note was at the time in the possession of Jerome, whoever was its owner. On the other hand, if they credited the evidence of Jerome and Litchfield, then the note was not only not owned by Jerome in December, 1857, and January, 1858, but was not in his possession. It seems to me that the whole transaction between Jerome and Leland was completed one way or the other, either with or without the transfer of the defendant's note. Jerome in effect delivered to Leland whatever notes he sold him, and the question is, whether this note was included in the transaction or not.

There was another view taken, however, of the case at the trial, which was material no doubt in producing the result at which the jury arrived, under the instructions which they re-

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ceived from the court. This was that Jerome sold the note in question to Leland in exchange for the Iowa lands, but that he neither owned it nor delivered it, at the time. This is in effect the third of three possible or supposed states of the facts consistent with the theory that Leland purchased the note or agreed for its purchase of Jerome. Either Jerome owned the note in December, 1858, and sold and delivered it to Leland, retaining its possession simply as agent of the latter; or he transferred and delivered it to Leland, retaining its possession in like manner, but not being its owner at the time of the sale, or he sold it, that is received a consideration for it, and agreed to transfer and deliver but did not transfer it, and was not the owner of it at the time. The last supposition involves also, as the evidence and the instructions of the court to the jury based upon such a theory of the case were understood, that Jerome was not only not the owner, but was not in possession of the note at the time of his transaction with Leland. Assuming that Jerome sold Leland the note of the defendant in 1858, but did not own it at the time, and did not have it in his possession, then the question is presented upon which the last instruction of the learned judge at the trial was given to the jury. There is another fact now to be mentioned which becomes important in this connection. In August or September, 1860, Edwin C. Litchfield, who had acquired the possession and at least an apparent title to the note at some previous time, retransferred the note to Jerome. Jerome continued the owner until it was transferred to the present plaintiffs. The testimony of Litchfield and of Jerome is positive to the effect that the note was not in the possession or under the control of the latter from December, 1857, or January, 1858, when they say he transferred it to E. C. Litchfield, to August, 1860, when he received it back from Litchfield and again became its owner. The defendant however contends that if Jerome was not the owner nor in possession of the note when he sold it to Leland in 1858, and did not deliver it to the purchaser at that time, yet that as

he afterwards unquestionably acquired the title this enured to the benefit of Leland, and made the defendant's payment to him good and effectual, because upon such a sale Jerome must be deemed to have warranted the title to the note, by implication of law.

It must be considered as settled, in the jurisprudence of this state, that the rule of *caveat emptor* which obtains in the common law is subject to the exception that a warranty of title in the vendor is implied in a contract of sale.* (1 *John.* 274. 20 *id.* 196.) But this exception is limited to cases where the vendor is at the time in the possession of the thing sold. This is the rule given by Ch. Kent, (2 *Comm.* 478,) and which is to be deduced from the authorities, although perhaps the question of a sale by a vendor not in possession was never distinctly discussed in the courts of this state until the case of *McCoy v. Artcher*, (3 *Barb. S. C. R.* 323.) In that case the authorities were examined, and the question discussed in a well considered opinion delivered by Mr. Justice A. J. Parker. The conclusion at which he arrived, and which no doubt received the sanction of the court, was that when the vendor had not possession at the time of the sale, no warranty of title would be implied. The contrary view expressed by Mr. W. W. Story in his treatise on *Contracts*, § 535, and on *Sales*, § 367, was disapproved and was shown to be at variance with the current authorities. A similar opinion to that stated in *McCoy v. Artcher* was expressed in *Edick v. Crim*, (10 *Barb.* 445,) and in *Hopkins v. Grinnell*, (28 *id.* 533.) The possession of the vendor is in truth the foundation of the implied warranty. Possession is as high evidence as a purchaser can have of the title to chattels. The vendor having the goods sells them as his own; and it may fairly be implied from his selling them under such circumstances that he represents and undertakes that they are his own. In the case of *Morley v. Attenborough*, (3 *Wels. Hurls & Gor.* 499,) it was held in the English court of exchequer that a pawnbroker who sold goods which had been pledged to him and

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not redeemed, was bound by an implied warranty of title, because although the goods were in his possession, they were understood to be held by him not as his own property, but simply as pledges unredeemed. The character of his possession was such as to imply only that the goods had been pledged to him, and had not been redeemed, and not that he had title, and therefore he was held to have warranted no more. The opinion of the court was delivered by Baron Parke, and is very elaborate. Whatever may be thought of the main point decided, the case contains a strong sanction of the view that the implied warranty of a vendor's title admitted by our law, results from his possession and consequent apparent ownership, and depends upon the character of that possession.

If therefore Jerome made a contract to sell the note of the defendant to Leland when he was not its owner, and it was not in his possession, the purchase was at the risk of Leland, and the law implied no warranty by Jerome that he had the title to the note. The estoppel which the defendant invoked, therefore, failed. The extinguishment of the note which he asserted, in consequence of the subsequent acquisition of title by Jerome, could not have been effected. The instruction of the learned judge at the trial, upon this point, and which, upon the admitted facts of the case, amounted in effect to a direction to find in favor of the defendant, was erroneous.

It is said that if Jerome had brought an action upon this note after its retransfer to him, he must have been defeated by the payment to Leland. I am not prepared to admit this. When Clark paid Leland he knew that Leland did not have possession of the note, and he took the risk of the validity and effect of his payment. Leland could not have compelled payment without producing and canceling or accounting for the note. No doubt Leland could have recovered of Jerome the consideration which he paid for the note, and Clark could have recovered of Leland what he paid him. But neither payment, upon the state of facts shown here, amounted to

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the face of the note, and if there would have been any equities between Jerome and Clark in the case supposed, they would not have effected the extinguishment of the note. I see no reason why Jerome should have been defeated in a suit against Clark because the latter had paid the note to Leland to whom Jerome had sold the note without having or delivering the possession, and without warranting the title. The whole question turns upon the warranty of title by Jerome, and when that does not exist, there is no foundation for such a defense.

There might be a distinction shown between such a case and that before us, however, and we are called upon at present to adjudicate upon the rights of these parties only.

The judgment must be reversed and a new trial ordered, with costs to abide the event.

[KINGS GENERAL TERM, February 9, 1863. *Brown, Emott, Scrugham and Lott, Justices.*]

HAVILAND and others *vs.* CHACE and others.

Where a special partner does not pay, *in cash*, the amount of capital agreed to be contributed by him, but makes the payment in goods &c., this is not a compliance with the statute respecting limited partnerships.

If the provisions of the statute are not complied with, the limited partnership is not formed, and if a false affidavit in respect to the payment in cash of the sums alleged to have been contributed by the special partners, is filed, all the partners will be liable for *all* the engagements of the partnership, as general partners.

The liability of each partner, in such a case, will not be limited to the proposed term of the special partnership, but extends to all the engagements of the partnership, so long as it has a legal existence. GOULD, J. dissented.

APPEAL from a judgment entered on a verdict rendered at the Columbia circuit in 1860. The action was brought upon several notes made by the alleged general partner in a

39	283
44	634
28h	222
108a	602
120a	390

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special partnership, and the defendant Chace was sought to be held thereon, on the ground that he had not paid in, "in cash" the amount of capital which the papers filed alleged he had ; the payment having been made in goods &c. The judge at the circuit held that he was not thereby made a general partner, but was liable under the statute, for the engagements of the firm, up to the time for which the alleged special partnership was formed ; not for those thereafter made. The plaintiffs had a verdict for some of the notes coming within the decision, and excepted to the ruling, as to the other notes. Judgment having been perfected, this appeal was brought, by the plaintiffs.

M. I. Townsend, for the plaintiffs.

J. H. Reynolds, for the defendants.

PECKHAM, J. Upon the first question involved in this case, as to the statute having been complied with by the alleged special partner, by paying in his capital in actual cash, there is no difference of opinion in the court. We all agree that it was no compliance.

The only remaining question arises upon the true construction of the eighth section of the act in regard to special partners. And here I may remark that the equities of any particular case, and the reliance that any creditor may have placed upon the credit of the alleged special partner, are blind guides in the sound interpretation of a general statute, founded upon enlarged principles of public policy. Such considerations are far more calculated to mislead than to enlighten.

We agree that the defendant Chace did not pay in the amount of the cash capital agreed to be contributed by him in order to make him a special partner. The affidavit required by the seventh section to be filed was not true, as to the alleged payment in cash.

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In giving construction to a statute the legislative intent is to control, irrespective of the mere proprieties of language, or the strict grammatical import of isolated words or phrases. An attempt to discriminate unjustly and without reason between different cases of a like kind is not to be ascribed to the legislature, unless expressed with irresistible clearness.

These rules are quite familiar, but they are well illustrated in *Olcott v. The Tioga Rail Road Company*, (20 N. Y. Rep. 210,) in the elaborate points of the counsel for the appellant in that case, and in the case itself.

In the statute under consideration the mode and manner in which a person may become a special partner are carefully pointed out. And it is obviously the general purpose of the statute to make such person a general partner, if he fail to comply with those provisions. In fact it would seem to follow as a matter of course that such person would be a general partner if he failed to comply with the provisions that make him a special partner, though no express declaration to that effect were contained in the statute. It is only by force of the statute that his liability is limited. It is there limited upon his compliance with the provisions which alone make him a special partner. The first section provides that limited partnerships "may be formed upon the terms, with the rights and powers and subject to the conditions and liabilities herein prescribed." If such provisions are not complied with, it follows, without any declaration to that effect, that the limited partnership is not formed. Now the eighth section says expressly that "no such partnership shall be deemed to have been formed until a certificate shall have been made, acknowledged, filed and recorded, nor until an affidavit shall have been filed as above directed." Referring to the affidavit that the capital of the special partner "had been actually and in good faith paid in cash." Is a false affidavit for that purpose better than none? Is a confessedly false affidavit any substantial compliance with the statute? Would not the defendant be estopped from setting up his

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own wrong—the filing of a false affidavit—to shield him from the liabilities of a general partner? A person puts in property instead of cash, estimated by the parties at \$10,000 cash, but worth or would sell for cash for not more than one-third of that sum, yet the affidavit and papers, on their face, comply with the statutory requirements, and he claims to be a special partner to \$10,000, and it is so published in the newspapers. He is thus made a partner, interested in the profits and losses of the concern, but can he set up his own wrong in such case and claim with any plausibility that he is a special partner? I think not. To allow it would be to sanction and encourage fraud. This case has no analogy to cases of corporations, where provision is sometimes made by statute that the filing of a certificate shall be conclusive evidence of compliance with the statute, so as to constitute a corporation; or where it is made a corporation by the filing of a certain certificate. There it has been held, and properly, that the corporation is formed and exists until declared otherwise by a direct proceeding for that purpose. That it cannot be questioned except in that way. The principles applicable to these cases are not different from those pertaining to the case here.

But we are not left to reasoning and argument, upon this point. The statute declares, in terms, that “if any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable” (for what?) “for *all* the engagements thereof, as general partners.” I am unable to perceive how the legislature could have spoken in plainer or more comprehensive terms. Not having complied with the statute, the defendant is not a special partner, in any sense or degree; neither as to the duration of the partnership nor any thing else. If not, then the act as to special or limited partners has nothing to do with him. It cannot be claimed that the defendant would be any sort of a special partner, in whole or in part; that he would be half a special partner by having his liability

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limited as to time, but a general partner in all else. The act intended no such anomaly. It is claimed, however, or the alleged peculiar language of this section, that the defendant's liability is limited to the proposed term of the special partnership, and cannot extend beyond. In other words, that he is made in that respect a special partner—a half or a third special partner—and as to the other half or two-thirds he is a general partner. But let us look at this language a little more closely. All the persons interested in such partnership shall be liable for all the engagements thereof as general partners. This surely included all the contracts and liabilities, but of whom, or of what? All the persons interested in such *partnership* shall be liable for all the engagements *thereof*; that is, plainly, of such partnership. How long does that partnership continue? Until it is dissolved according to law, and proper notice given of such dissolution to those who have been dealing with the firm. It is not dissolved, nor does it terminate, by or according to the original terms of partnership, any more than if it had been in terms, a general partnership; because, having failed to comply with the law, it never became a special partnership, and the shield of the act in relation to special partners is not over it. The engagements "thereof" are the engagements of the partnership, so long as it has a legal existence. How and to what extent shall they be liable for such engagements? They shall be liable "as general partners." This is the plain purpose of the law. I have already alluded to the general object of the statute—that if its several provisions were not complied with, the partnership should be general and not limited. This is declared in some six or seven sections, but in scarcely any two in precisely the same language, and in none more explicitly and fully than in the 8th section. In the 9th section it is declared "the partnership shall be deemed general." In the 11th section "such partnership shall be deemed a general partnership;" adding the word *partnership*. In the 13th section "he shall be deemed a

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general partner." The same language in the 17th section. In the 22d section "shall be *liable* as a general partner." It is not judicious to attempt by ingenious refinement to discover some deep hidden meaning in a statute, not apparent and palpable in its plain reading. Again, section eleven provides for a renewal of a special partnership, in the same manner as its original formation, requiring the same thing as required by the 8th section now under consideration, and that declares, in terms unlimited and unqualified, that if otherwise renewed "the partnership shall be deemed a general partnership." This is the same case, the same principle as in section eight, and the same reason for it. Where the liability is to be specially limited, it is plainly and expressly stated, as in section twelve.

In some provisions as to liability we have to look to the statute alone for its extent; as where the special partnership is wholly formed and a penalty or liability is imposed for violating some of its provisions as to the conduct of the special partner, that he must not interfere in the general business &c., as in section seventeen, failing to comply with the provisions. But here, in section eight, the special partnership is never formed—the vital part thereof, the cash, was never in. It is scarcely to be believed that the legislature intended to treat the latter case with less rigor than the former.

In every view I can take of this case, of the law of partnerships, of the true construction of this statute, both from its plain terms and its general purpose, as well as from principles of public policy, I am of opinion that the defendant is liable as a general partner, without limit as to time, except as before expressed; and hence the judgment must be reversed and a new trial granted, with costs to abide the event.

HOGEBOM, J. concurred.

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GOULD, J. (dissenting.) Though no special partnership was formed, the printed notice (which was *all* the notice the plaintiffs had of any such partners, the special partner not being named in the business,) gave to the plaintiffs notice that the partnership, (whatever it was, general or special,) would *cease* on such a day. And the debt in suit was contracted *after* that day. So that the plaintiffs had notice that it was not a partnership debt. This is the whole basis of my views that a new trial should not be had.

New trial granted.

[ALBANY GENERAL TERM, September 3, 1860. *Gould, Hogeboom and Peckham*, Justices.]

THE NEW YORK CENTRAL RAIL ROAD COMPANY *vs.* THE SARATOGA AND SCHENECTADY RAIL ROAD COMPANY.

It was stipulated in a lease that at the expiration of the term of three years from the 1st of July, 1837, or of any subsequent term of three years, the lessor, if dissatisfied with the amount of rent agreed to be paid, might give notice to the lessee of such dissatisfaction, and claim an increase; and if the claim was not adjusted, that he might make application to "the chancellor of the state of New York, for the time being," for the appointment of three appraisers to fix the amount of the rent. One of the terms of three years expired on the last of June, 1855. *Held* that the parties intended, by the term chancellor, in the lease, the court of chancery, and not the mere personal incumbent of the office of chancellor. And the court of chancery having been abolished, by the constitution of 1846, and the supreme court having succeeded to all its powers and duties; *Held*, further, that the latter court was the proper tribunal to which to apply for the appointment of appraisers.

And that an order made by a justice of the court, at a special term thereof, on notice, was a valid execution of the power.

Notice of dissatisfaction having been given by the lessor, on the 22d of June, to apply to a term which was to commence at the expiration of that month; *Held* that the notice was seasonable and proper, and not having been revoked, that it remained operative at the close of the term, on the last of June.

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Held, also, that a defect in the time or mode of service of the notice was an irregularity that might be waived; and that no objection having been made by the lessee, to the notice, as irregular or premature, it must be deemed to have waived all objections on that ground.

By the act of April 2, 1853, authorizing the consolidation of certain rail road companies, the interests and rights of property of the Utica and Schenectady Rail Road Company became vested in the New York Central Rail Road Company; and the latter company became the proper representative of the former, in regard to leases executed by it, and entitled to the benefit of the provisions therein contained.

The rent reserved in a lease executed by the Utica and Schenectady Rail Road Company of a part of its track, being a compensation for the use of such track, the right to it passed, as a necessary appurtenance to the ownership of the land and the superstructure upon it, to the New York Central Rail Road Company, under the act of consolidation and the agreement entered into between the several rail road companies in pursuance of it.

ON the 27th of November, 1837, the Utica and Schenectady Rail Road Company leased, during the continuance of its charter, to the above defendants, that part of the Utica and Schenectady rail road lying between Sandridge and State street in the city of Schenectady, to be used in common by the two companies, for which use the lessees were to pay a rent of \$1000 a year. This rent was by the terms of the lease subject to modification, as follows, viz: at the expiration of the term of three years from the 1st of July, 1837, or of any subsequent term of three years, the lessor, if dissatisfied with the amount of rent, was authorized to give notice to the lessee of such dissatisfaction, and to claim an increase; and if within a month thereafter the claim was not adjusted, in writing by the parties, the lessor was to be at liberty to make application, in writing, "to the chancellor of the state of New York, for the time being," upon due notice to the lessee, for the appointment of three suitable appraisers or arbitrators to examine into the ground and circumstances of the claim, and after a full hearing to make a just award thereon, according to the justice and equity of the case.

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Under and in pursuance of an act passed April 2, 1853, (*Laws of 1853, chap. 76,*) the said lessors and other rail road companies were consolidated, and organized under the name of The New York Central Rail Road Company. By the terms of this act, and of the agreement of consolidation, all the rights of the lessor, in said lease, were transferred to and vested in the plaintiff.

On the 1st of July, 1855, one of the said terms of three years was to expire. On the 12th of June next previous thereto the plaintiff's board of directors passed a resolution expressing their dissatisfaction with the rent then payable, and directing notice to be given claiming its increase for the term commencing on the said 1st of July then next, to \$5000. On the 22d June aforesaid, this notice was duly served upon the defendant pursuant to the lease; and on the 31st of July thereafter Mr. Schriver, the defendant's secretary, replied by letter declining to pay such increased rent. The plaintiff thereupon applied by petition to the supreme court, at a special term thereof held by Justice GOULD, for the appointment of appraisers in pursuance of the lease. The defendant opposed this application, on these grounds, among others, viz: That the notice or claim for an increase of rent under the lease were premature and ineffectual, not having been made at the expiration of any three years from the commencement of the lease, nor at the time nor in the manner required by the lease. That Justice GOULD had no power or authority to grant the order, the same having been conferred by the agreement of the parties upon the chancellor of the state for the time being, and the said justice not having succeeded to such authority. And that the New York Central Rail Road Company was not entitled to claim against the defendant the benefit of any or either of the provisions of said lease concerning any increase of rent to be paid thereunder. The court overruled the objections, and appointed Silas Seymour, William H. Tobey and Henry H. Brigham appraisers. The appraisers met, and both parties,

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by their respective counsel, appeared before them. The defendant's counsel presented the above objections to the authority of the appraisers, which were overruled. Testimony having been produced and counsel heard on behalf of each of the parties, the case was submitted to the appraisers, who thereupon made their award, in writing, increasing the said rent, from and after the said 1st day of July, to \$2800 per annum; a copy of which was duly served upon the defendant, who refusing to pay such increased rent, the plaintiff brought this action to recover the same. Issue having been joined the action was tried, at the Albany circuit, in April, 1860, before Justice GOULD, without a jury, and judgment rendered in favor of the plaintiff for \$9822.63, the amount of the three years' rent, claimed in the complaint, besides costs. From this judgment the defendant appealed to the general term.

W. A. Beach, for the appellant.

O. Meads, for the respondent. I. The service, on the 22d of June, 1855, of the notice of dissatisfaction and a claim for an increase of the rent, was a sufficient compliance with the requirements of the lease. The terms "*at the expiration of three years*" &c. are incapable of being literally and precisely complied with, but their real intent and object are fully answered by a notice given within eight days of the expiration of one term and the commencement of another. The word "*at*" is to be interpreted by the nature and circumstances of the case, and in this case it means "*about or near the time of.*" (*See Webster's Dict. "at."*) At all events the notice was a continuing one; and any objection on account of its service was waived by Mr. Schriver's reply, of July 31, 1855.

II. All the rights of the Utica and Schenectady Rail Road Company, as the lessors in the lease, passed to and vested in the plaintiff by the act of consolidation, (*Laws of 1853,*

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chap. 76,) and the agreement made by the companies in pursuance of it.

III. The appointment of the appraisers by the supreme court was a valid appointment, under the provisions of the lease. 1. The power given by the lease to "the chancellor of the state of New York for the time being" was, by the force and operation of the new constitution of 1846, and of the judiciary act of 1847, transferred to the supreme court; and the appointment of the appraisers by a justice of this court, at a special term thereof, was a valid execution of this power. (*Const. of 1846, art. 6, §§ 3 and 5. Judiciary act of 1847, ch. 280, § 16; 3 R. S. 5th ed. 278. Wilcox v. Wilcox, 4 Kern. 576.*) 2. The terms "chancellor of the state of New York for the time being" show that power was not limited to any particular person, but was intended to be conferred on the *functionary* who, for the time being, was entitled to exercise the functions of the office of chancellor. It was competent for the legislature to change the *name* of the office, or the *style* of the functionary, without thereby impairing or defeating the power.

IV. Even if the appointment of the appraisers had been irregular and unauthorized, it was competent for the defendants to waive such irregularity and affirm their authority; and the defendant, notwithstanding its preliminary objections, did so, by subsequently going on with the hearing before the appraisers, producing witnesses, and submitting the case. After thus taking the benefit of a hearing, they cannot be permitted to deny the authority of the tribunal to which they have voluntarily submitted. (*Leggett v. Finlay, 5 Bing. 255. French v. New, 20 Barb. 481. 3 Phil. Ev. Edw. ed. 331.*)

V. If by reason of the abolition of the office of chancellor, the appointment of the appraisers should be held to be unauthorized, then the particular mode of re-adjusting the rent, provided by the contract, having failed, it becomes the duty of this court, under its general equity powers, to provide

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some other adequate mode of carrying out the contract ; and the plaintiff has in his complaint prayed for such alternative relief. (*Quick v. Stuyvesant*, 2 Paige, 91. *Brown v. Brown*, 1 Barb. Ch. 217.) 1. It now appearing to the court that the proper increase of rent, to which the plaintiffs were entitled, has been ascertained by a tribunal before which the defendant has voluntarily appeared and had a full hearing, it is submitted that the amount thus ascertained may properly be adopted by the court as a fair measure of equitable redress, and be carried out and established by its judgment. 2. And if proper relief cannot otherwise be given, the court may order a reference, to determine the proper increase of rent.

By the Court, HOGEBOM, J. Three prominent objections are made to the plaintiff's recovery : 1. That Justice Gould was not the officer or functionary designated by the contract for the appointment of appraisers, and therefore had not power to make the appointment. 2. That the notice of dissatisfaction with the existing rent, and claim for increased rent, was out of time and premature. 3. That the plaintiff is not, for the purposes of this notice and claim of rent, the legitimate successor of the Utica and Schenectady Rail Road Company.

I. The officer or tribunal to whom, in case of disagreement as to the rent, application was to be made for the appointment of appraisers, was "the chancellor of the state of New York for the time being." I am of opinion that the parties thereby intended the court of chancery, and not the mere personal incumbent of the office of chancellor, and for these reasons :

(1.) The lease was to run during the corporate existence of the defendants, which might much exceed in duration both the official career and the life of the then chancellor.

(2.) It is highly probable that during the long period when these services might be called into requisition, the parties preferred to rely upon the presumed impartiality of a

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judicial officer, rather than upon any individual designated by name, however respectable and disinterested he might be, at the time of the contract.

(3.) We may reasonably presume that the parties employed the term "the chancellor of the state of New York" in the sense then well understood among professional men, and to a large extent outside of the profession, as synonymous with the "court of chancery."

(4.) The steps provided in the contract to be taken for obtaining competent and indifferent appraisers, apparently contemplate formal legal proceedings in a court of justice, by application in writing, after previous notice in writing, upon hearing both parties; and the subsequent proceedings before the appraisers closely resemble those usually had in the progress of a litigated action.

If the *court* of chancery was intended by the parties, and not the mere person temporarily filling the office of chancellor, then, the supreme court being by law and the constitution the lawful successor and recipient of the powers and duties formerly vested in the court of chancery, must also be deemed to be such, according to the provisions of the contract. This construction best satisfies the contract, accomplishes the objects intended, and preserves a perpetual and competent tribunal to answer its requirements.

If so, then Justice Gould, sitting as a court, was for the time being, the chancellor, the supreme court, the tribunal intended by the parties. As the vice chancellors could exercise the functions of the chancellor and of the court of chancery, so could one justice of the supreme court in his appropriate place and jurisdiction, represent the court. As the whole thirty-two judges were not essential to constitute the supreme court, so three were not necessary to discharge the duties appropriate (like those required in the present instance,) to the special term.

It is very true that the supreme court had no *general* jurisdiction over the subject matter of the order, and that none

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such can be conferred, even by the consent of the parties. But if the court, or its members, do not refuse to exercise this power of appointment, I do not see that the parties have any right to object. It is a mere mode of selecting impartial appraisers, solemnly agreed upon by them, under seal, and effectuates their wishes and intentions. It is not establishing a new head of equity jurisdiction, by which all citizens are bound, and which it is compulsory upon the court to assume, but an appointment of arbitrators by the parties themselves, through the court as their agents and appointees, in a manner to answer the ends of justice.

I am of opinion, therefore, that there is no necessity of resorting otherwise to the equitable powers of the court to enforce this contract, so that justice shall not be denied.

2. I think the notice of dissatisfaction and claim of increased rent was regular, and conformable to the provisions of the contract. The claim was made at the expiration of one of the three years terms. The notice was given in the latter part of June, to apply to a term which was to commence at the expiration of that month. The notice was, I think, seasonable and proper. It apprised the defendant of the wish of the plaintiffs before the new term was to commence, and enabled the defendant to make timely provision for the consequences. Though given before the expiration of the term, it was not to take effect till the expiration of the term. As it was never revoked, and remained unanswered till the last of July, it must be deemed operative at the close of the term on the last of June, and must therefore be deemed good from that period. It was practically a notice at that time. It conformed, substantially, to the intention of the parties, both in substance and time. No objection was made to it as irregular or premature, but objection was made to the increase of the rent, and a desire for negotiation expressed. I think a defect in the time or mode of service of the notice was an irregularity that might be waived, and that this was a waiver. The defendants reposed upon ob-

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jections to the substance of the claim, and not to its mode of presentation.

3. For the purposes of the notice and claim of rent, I think the plaintiff was the proper representative of the Utica and Schenectady Rail Road Company. By the act of consolidation the interest and rights of property of the latter company became vested in the former. (*Laws of 1853, ch. 76.*)

This, also, is the fair construction of the contract. If the interest of the Utica road passed by assignment, it was obviously intended—at any rate is obviously just—that the assignee and beneficial owner should have the benefit of this provision of the lease. The rent was a compensation for the use of the land and the superstructure upon it, and the right to it passed, I think, as a necessary appurtenance to the ownership of such land and superstructure; and so long as the defendant obtained under the assignee of the Utica road the benefit and use of the road, it is obviously just that such assignee should have the benefit of the rent and of the stipulation for an increased amount. The plaintiff was the real party in interest, and it was not only proper, but necessary, that the action should be brought in its name.

I think the plaintiff's claim was well founded; that the action was well tried; and that the judgment should be *affirmed*.

[ALBANY GENERAL TERM, September 2, 1861. *Wright, Gould and Hogeboom, Justices.*]

STAATS vs. THE HUDSON RIVER RAIL ROAD COMPANY.

Where two or three independent causes of action are prosecuted, in a justice's court, and the judgment is right as to one and erroneous as to the others, which fact distinctly and plainly appears on appeal, it is the right and duty of the county court to reverse as to the erroneous and affirm as to the legal part of the judgment.

APPEAL from a judgment of the Rensselaer county court, which reversed a judgment of a justice's court, where the plaintiff recovered \$75 and costs, against the defendant. The complaint was for killing two of the plaintiff's cattle on the defendant's road, a cow in January, 1859, and a bull in October, 1859. It appeared that the cow was running at large and wrongfully on the highway where she was killed as the defendant's road crossed the highway. It also appeared that the plaintiff's bull escaped from his lot adjoining the defendant's road; that the fence along said lot was insufficient and defective, which the defendant was bound to make and maintain. The fair inference from the evidence was that he escaped on account of such defect, strayed upon the defendant's road and was killed.

T. M. North, for the appellant.

Mr. Runkle, for the respondent.

PECKHAM, J. The evidence clearly shows that the cow was wrongfully and negligently on the defendant's road. In such a case no action lies for her loss. (*Munger v. Tonawanda Rail Road Co.*, 4 N. Y. Rep. 349.)

But for the killing of the bull a proper case was made out; certainly a *prima facie* case for submission to the jury, and their verdict for damages for his loss could not be disturbed.

A question was made as to the admission of evidence as to the sufficiency of the fence, which the defendant was required to make and maintain. (*See Laws of 1854*, p. 611, § 8.) A witness (Cheever) was asked by the plaintiff's counsel to

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state if the fence was sufficient to turn orderly cattle, or not, and if not, why? The question was objected to, as incompetent, immaterial and leading. If objectionable at all, it was so only because it called for an opinion of the witness, instead of a fact. But that precise ground of objection is not taken. The question does not literally ask for an opinion, but substantially makes it necessary to give one, to answer one branch of the inquiry. Hence it was the more important that an objection, if intended to present the impropriety of calling for or proving an opinion, should have expressly said so. Such an idea, however, would scarcely be obtained from the form of the objection. I do not think the objection was presented with sufficient clearness in that (a justice's) court to be available to the plaintiff here. The objection is merely technical, as the facts were fully presented by the witness, and made out a proper case of an insufficient fence in fact. And his opinion, which was nowhere precisely or particularly objected to, was of no moment at all. He proved the posts of the fence to have been 12 feet apart; that an animal could in most places put its head through the wires and get through, particularly where the wires were light; that his father's cow and a spring calf went through, and they were orderly. In my opinion, therefore, the recovery was right as to the bull, and wrong as to the cow.

The only remaining question is, could and should the county court have reversed the judgment of the justice as to the damages for the cow, and affirmed it as to the bull?

It is objected by the defendant that a county court cannot reverse in part and affirm in part a justice's judgment for entire damages. And the case of *Kasson v. Mills*, (8 How. Pr. Rep. 377,) is cited to that effect. The case sustains the position in terms, but the facts were wholly unlike the facts here. I have carefully examined all the cases referred to in *Kasson v. Mills*, and am of opinion that the county court had authority, in this case, to reverse the judgment in part and affirm it in part, and should have exercised it.

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The code, re-enacting the revised statutes, expressly gives that power to the court. It is not confined, in terms, and there is no reason for confining it, to a mere power to reverse or affirm as to costs and reverse or affirm as to damages. Where two or three independent causes of action are prosecuted in a justice's court, and the judgment is right as to one and erroneous as to the others, and that can be distinctly and plainly seen on appeal, the power to reverse as to the erroneous, and affirm as to the legal part of the judgment, is plain and practical, and in my opinion imperative, with a view "to give judgment according to the justice of the case," as provided for in the code. After a careful examination I have been unable to find any case that conflicts with this plain power, and our plain duty in its exercise. In *Kasson v. Mills* it is difficult to perceive from the report of the case upon what ground the county court proceeded in reversing the judgment in part and affirming it in part. In the justice's court it was for \$100. It was reversed on appeal, except as to \$3.36. But why it was valid for that sum does not in any way appear; nor what that amount was for, in any manner. It may therefore well be that this court was right on the facts as they appeared in that case—a single indivisible cause of action—in holding that the county court committed an error in reversing the judgment in part and affirming it in part.

Suppose an action brought upon two several promissory notes, to one of which the defendant proved a clear legal defense of usury, but none to the other, and the court gave judgment for both. Would there be any difficulty in giving judgment, on appeal, for the valid note, and reversing it as to the void note? Suppose an action for two penalties alleged to have been incurred on different days, judgment for both and illegal as to one, on appeal the judgment would be affirmed as to the one and reversed as to the other. This last case has been expressly decided, in Massachusetts, by the highest court of that state, and I find nothing in this state in conflict with it. (*Commonwealth v. Derby*, 13 Mass. Rep. 433.) I

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see no reason or principle against the doctrine of this last case, the opinion in which was delivered by Ch. J. Parker ; and I am disposed to follow it and the statute of this state re-enacted in the code, which allows it. I see no objection to obeying the statute where, as here, it can be distinctly seen for what the judgment was given, and which separate alleged cause of action is illegal or erroneous. In this case it clearly appears from the proof that the jury allowed \$50 for the cow and \$25 for the bull.

The judgment of the county court is reversed, and that of the justice affirmed as to \$25 damages and the costs. No costs allowed on this appeal.

HOGEBOOM, J. I concur in the above opinion that the justice should have rendered judgment for the plaintiff for \$25, (instead of \$75,) and that the county court should have reversed it as to \$50, and affirmed it as to \$25, instead of reversing altogether, and that this error should be corrected. But whether the proper mode of correcting it is by reversing *both* judgments, leaving the plaintiff to sue anew, or whether it may be disposed of as done in the opinion of Justice Peckham, I have not as yet examined.

MILLER, J. concurred.

Judgment of the county court reversed, and that of the justice affirmed as to \$25 and the costs.

[ALBANY GENERAL TERM, May 5, 1862. *Hogeboom, Peckham and Miller, Justices.*]

VOSE and others *vs.* THE HAMILTON MUTUAL INSURANCE
COMPANY in Salem.

On the 1st of May, 1852, the defendant insured the plaintiffs' stock in trade in a store No. 146 River street, Troy, for \$2500 for three years. The 18th article of the policy provided that "in case any other policy of insurance has been or shall be issued covering the whole or any portion of the property insured by this company," the policy issued by the defendant should be void, unless the company had notice thereof and gave a written consent thereto. On the 9th of August, 1854, the goods were, with the consent of the defendant, removed to an adjoining store, in the same building, known as No. 148. At that time the insured had a stock of goods of the same description, in No. 148, which had been insured for \$2500 by another company, January 12, 1852, for five years. The defendant gave no consent to such prior insurance, and had no knowledge of it. *Held* that this was not a case of double insurance, in violation of the 18th article of the policy. HOGEBOM, J. dissented.

APPEAL by the defendant from a judgment entered upon the report of a referee. The action was upon a policy of insurance issued by the defendant on the 1st of May, 1852, for \$2500 for three years, upon the stock in trade in No. 146 River street, Troy, consisting chiefly of ready made clothing. The 18th article of the policy provided that "in case any other policy of insurance has been or shall be issued covering the whole or any portion of the property insured by this company," the policy issued by the defendant should be void, unless the company had notice thereof and gave a consent in writing thereto. On the 9th day of August, 1854, the defendant consented to the removal of the goods insured to an adjoining store, part of the same building and known as No. 148, and the goods were so removed. At that time the party insured had a large quantity of other goods (also ready made clothing) in store 148, which had been insured by another company, by a policy issued and dated on the 12th of January, 1852, for \$2500, for five years. On the 5th of August, 1854, the insured obtained the consent of the other company to \$2500 additional insurance in the defendant's company. There was no consent of the defendant

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to the other insurance by the other company, nor any knowledge thereof. The goods in 148 were chiefly destroyed by fire on the 11th of December, 1854. The referee found that there was no double insurance in violation of the 18th article, and reported in favor of the plaintiff for half the loss.

J. H. Reynolds, for the appellant.

J. A. Millard, for the respondent.

PECKHAM, J. It appeared on the trial that the goods in store No. 148, after removal, were one consolidated stock, not kept separate, but replenished from time to time up to the fire. The question is did these facts constitute a violation of that provision of the policy forbidding double insurance except by consent.

That there was a double insurance in fact and in law is clear, from the time the goods in No. 146 were removed to No. 148. The two policies then attached to the consolidated stock and also to all goods purchased from time to time to replenish it. (1 *Phil. on Ins.* 5, 491. *Angell on Ins.* § 203. *Hooper v. Hudson R. Fire Ins. Co.*, 17 *N. Y. Rep.* 426.) The plaintiff was aware of the effect of this consolidation of the stock as to the insurance, as he procured the consent of the other company for the additional insurance by the defendant of \$2500. This additional insurance was made or effected solely by this removal of the goods from No. 146 to 148.

The 18th article of the defendant's by-laws provides in terms against any policy "that has been or shall be issued." It will perhaps be better understood if each part be considered separately. Has that part of the article referring to a policy that "has been issued" been violated? If that part stood alone it would read "In case any other policy has been issued covering the whole or any portion of the property insured" this policy shall be void unless &c. That provi-

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sion, thus stated, would plainly refer to a policy that had already issued and that then covered this property. It had no reference to any policy already issued that did not cover this property. With such a policy the defendant could have no concern. There was in fact then no policy issued, at the time the defendant issued its policy, "covering" or touching the property then insured by the defendant. The property afterwards became covered by the policy of the other company, by its subsequent removal to No. 148. The same may be said of the property in No. 148 prior to the removal of the goods from 146. They were not insured by the defendant's policy, prior to the removal. The removal extended the defendant's policy. That removal was not a re-issuing of either policy.

This act of removal, as matter of law, without any new agreement or new policy, made the property covered by the other policy.

As to the other provision of the article, having reference to the future, it is not pretended that any policy has in fact been issued since the issuing of the defendant's policy covering the property insured by the defendant.

This is a close case, and is disposed of upon the peculiar and precise phraseology of the defendant's by-law. The defendant has been careful to frame some thirty by-laws, modifying and qualifying its liability; providing specially when the policy shall be void. The language of this by-law does not cover this case of insurance by this transfer of the property. No fraud is imputed to the insured, in the transaction, and I do not think the defendant is at liberty to insist that the insurance is forfeited by an act that is excluded as a ground of forfeiture by the terms of the article on that subject.

I confess I have not arrived at this result, in this case, without considerable hesitation, in view of the temptations to fraud held out by additional insurances, and of the necessity of their being known to insurance companies. But a

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forfeiture of the insurance should not be enforced against the language of the provision itself.

The judgment should be affirmed.

MILLER, J. concurred.

HOGEBOM, J. (dissenting.) I am of opinion that upon the true construction to be given to article 18 of the by-laws of the defendant, attached to the plaintiff's policy of insurance, the plaintiff is not entitled to recover.

1. The plain object and intent of that article was to protect the company against double insurance without its consent; because in the event of such insurance there might be a strong temptation to fraud, in the policy-holder. The article was obviously designed to cover all possible cases of double insurance, and with this manifest intent of the parties before our eyes, I think we ought to give such a construction to the contract as will effectuate that intent, if we can do so without doing violence to the language employed.

2. And I think this can be done. The words are, "In case any other policy of insurance has been or shall be issued covering the whole or any part of the property insured by this company," the policy shall be void. Now while it is true that at the *time* the defendant's policy was issued, no other policy had been issued *then* covering the property insured by the defendant, it is equally true that a policy had been issued which, without alteration of its terms, *thereafter* covered the property insured by the defendant. In other words, certain property previously insured in a Troy company became by removal into the store mentioned in the defendant's policy covered by the defendant's policy. I think the clause in question, without any violence to its language or obvious intent, can and should be read as if it had been written "In case any other policy of insurance has been issued *now or hereafter* covering the whole or any part of the property insured by this company."

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3. Again; take the other alternative: "In case any other policy of insurance *shall be* issued covering the whole or any part of the property insured," &c. Was not the Troy policy, so far as the property insured by the defendant was concerned, though *dated* before the defendant's policy, *in effect* issued afterwards; that is, did it not take effect *afterwards* upon the property insured by the defendant? Too narrow a construction should not be given to the word *issued*. As used in this clause it is synonymous with "take effect," or "become operative;" and if this meaning be applied to it, it plainly covers the present case.

4. In a subsequent part of the same article, it is provided that "in case of loss or damage of property upon which such double insurance *subsists*," the defendants' company shall in the event of consent being given to the additional policy, not be liable for more than its proportional part of the loss. Now here plainly a double insurance subsists at the same moment, and this was the very contingency designed to be provided for by this article.

5. In considering this question I have of course assumed, as did the referee and the counsel on both sides, that by the removal of the goods all the property was protected by *both* policies if valid. (*Hooper v. Hudson River Fire Insurance Co.*, 17 N. Y. Rep. 426.) At all events the *new* goods were, and no discrimination has been made between them, in the referee's report. Hence whether or not a portion of the goods only was covered by double insurance, a new trial is, if I am right, essential to adjust accurately the rights of the parties.

I am of opinion that the judgment entered upon the report of the referee should be reversed and a new trial granted, with costs to abide the event.

Judgment affirmed.

[ALBANY GENERAL TERM, May 5, 1862. *Hogeboom, Peckham and Miller*, Justices.]

THE PEOPLE *ex rel.* JOSEPH BOICE *vs.* MELISSA BOICE.

The act of the legislature, of March 20, 1860, constituting every married woman the joint guardian of her children, with her husband, did not limit the guardianship of the wife to the period of coverture, but in case of the death of the husband, the power survived to the wife, and the husband could not deprive her of the right by appointing a testamentary guardian. The legislature, by the act of April 10, 1862, amending the act of March 20, 1860, and repealing the above provision thereof, did not intend to restore the power given to the father, by the revised statutes, of appointing a testamentary guardian, or to infringe materially upon the mother's right to the custody of her children, in case she survived her husband.

THIS is a common law certiorari awarded by the supreme court, upon the application of Joseph Boice, for the purpose of reviewing the decision of Henry Brodhead, jun. county judge of Ulster county, transferring to Melissa Boice the custody of her infant child. On the 22d day of January, 1862, the above named Melissa Boice presented a petition to the said county judge, alleging that her infant child, Charles Boice, who was between the ages of *two and three years*, was illegally restrained of his liberty by the relator, Joseph Boice. The petition alleged that the petitioner, whose maiden name was Margaret Fiero, was married during the year 1853, to one John H. Boice; that the said John H. and the said Melissa cohabited as man and wife, and on the 27th day of May, 1859, Charles Boice, (the child whose custody was sought to be obtained,) was born; that the said Charles was the legitimate son of the said Melissa and the said John H. Boice; that John H. Boice departed this life on the 10th day of November, 1861, leaving him surviving his widow, the petitioner, and his said son Charles; that the said Charles was illegally restrained of his liberty by Joseph Boice, who claimed the right to his custody, under and by virtue of the last will and testament of the said John H. Boice, deceased, who by such will had appointed him (Joseph) the guardian of such child. The judge allowed the writ. The return of Joseph Boice to the writ, admitted that the child was the

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legitimate son of Melissa Boice, the petitioner, and the said John H. Boice, deceased. It further alleged that the petitioner, Melissa, on or about the 17th day of February, 1860, had, without sufficient cause, left the house of the said John H. Boice, deceased, leaving the child in the care of his father; that on or about the 1st day of March, 1860, the petitioner, Melissa, commenced an action in the supreme court against the said John H. Boice, deceased, for a separation from bed and board, and for the custody of the child; that in the month of May, 1860, a motion was made by the said petitioner for alimony during the pendency of the suit, and for the custody of the child, which motion, so far as the custody of the child was concerned, was denied; that during the pendency of the suit John H. Boice died, having left a will, by which will, duly proved before the surrogate of Ulster county, the relator, Joseph Boice, had been appointed the testamentary guardian of such child. The return then alleged that the petitioner, Melissa, was of feeble health, and unable to support the child, who was better cared and provided for by the relator than he could or would be by the petitioner, his mother; that he believed the application was made by the mother for the custody of the child to obtain the \$150 of personal property, which had been set apart by the appraisers; that the child was alienated in his affections from his mother, the petitioner, and was much attached to the relator, and those employed by him to take care of the child.

Upon the return day of the writ, the petitioner demurred to the return of the relator, alleging as cause therefor that the return showed no legal cause for the detention of the infant. The judge held the return to be sufficient, and overruled the demurrer. The matter was then adjourned to the 4th day of February, 1862, when the parties again appeared with their counsel, and testimony was given on both sides. On the part of the relator it tended in some degree to show that the temper and disposition of the mother were some-

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what bad and rough, and that she did not treat the child with much affection; that she left and abandoned her husband, and that the child was well cared for by the relator and was improving in health and appearance. The testimony on the part of the mother tended to show that her temper was not bad; that her habits were industrious and her treatment of the child affectionate and kind; that she was living with her father who was willing and competent to take care of her and the child; that the relator was a single man, of little property, who was obliged to rely more or less upon a female attendant to take care of the child.

The county judge, after hearing the case, decided that the infant was illegally restrained by the relator, and directed the latter forthwith to discharge the infant from his custody and to deliver him to his mother, Melissa Boice. The relator thereupon sued out a certiorari to review the proceedings and reverse the order of the county judge.

Peter Cantine, for the relator.

T. R. Westbrook, for the defendant.

By the Court, HOGEBOM, J. At the time these proceedings were had before the county judge of Ulster county, the law of 1860 (*chap.* 90) was in force; the 9th section of which declares that "every married woman is hereby constituted and declared to be the joint guardian of her children with her husband, with equal powers, rights and duties in regard to them with her husband." This was a valid act of general legislation, not interfering with vested rights, and materially curtailed the right of the father and enlarged that of the mother in regard to the guardianship and custody of infants. It placed the father and the mother upon strict legal equality, and it does not in terms, nor in my opinion in legal effect, limit the guardianship of the wife to the period of coverture. The law must be liberally construed to effectuate

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its obvious intent, which was to enlarge the sphere of maternal authority. I am of opinion, therefore, that the power would survive to the wife in case she survived her husband. If so, it would seem to be inconsistent (in case of the survivorship of the wife) with those provisions of the revised statutes, (2 *R. S.* 150,) which confer upon the father the power of appointing a testamentary guardian, and, as a later expression of the legislative will, must be deemed *pro tanto* to repeal those provisions. Hence the power attempted to be exercised in this instance by the father was ineffectual, and the testamentary guardian had no right, as against the surviving wife, to the custody or guardianship of the infant. The mother was entitled to its custody and control, and to the aid of the writ of habeas corpus to free it from the illegal restraint of the pretended testamentary guardian, which illegal restraint in the case of an infant of such tender years as to be incapable of a voluntary selection of its protector, is not effectually removed until it is restored to the custody of its lawful guardian and surviving parent. (*Mercein v. People*, 25 *Wend.* 73. *People v. Chegaray*, 18 *id.* 637. *People v. ———*, 19 *id.* 16. *People v. Porer*, 1 *Duer*, 709, 724. *People v. Cooper*, 8 *How. Pr. Rep.* 288, 296.)

The order of the county judge was therefore proper at the time it was made.

But by the law of 1862, (*chap.* 172, § 2,) the 9th section of the act of 1860, before quoted, is repealed, and it might become necessary to determine the effect of this repeal upon the order aforesaid, and the question whether it did not revive the provisions of the revised statutes, were it not for the 6th section of the act of 1862, which is as follows: "No man shall bind his child to apprenticeship or service, or part with the control of such child, or *create any testamentary guardian therefor*, unless the mother, if living, shall in writing signify her assent thereto." The terms of this act are too clear to admit of the supposition that the legislature designed to restore the power of appointing a testamentary

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guardian to the father, or to infringe materially upon the mother's right to the custody of her child of such tender years.

On the merits of the case as to the question whether the mother or the uncle of the infant is the more suitable person to be entrusted with such a charge, if that question is a proper one for discussion on this application, I am of opinion that the testimony is by no means decisive, nor of such a character as to require us to deprive the mother of the custody of her child on any such ground.

I am of opinion that the proceedings before the county judge should be affirmed.

Judgment accordingly.

[ALBANY GENERAL TERM, September 1, 1862. *Hogeboom, Peckham and Miller, Justices.*]

CORNING & WINSLOW *vs.* THE TROY IRON AND NAIL FACTORY.

A lease, under which the defendants had held certain premises, expired on the 1st of February, 1852; the defendants had six months thereafter, to remove buildings &c. On the 23d of July, 1852, a deed of the premises was executed to the plaintiffs, the defendants being at the time still in the possession; but they had made no open or notorious claim of adverse possession. *Held*, that they were to be deemed tenants holding over, or persons claiming possession under the former title, and not as holding under an adverse title.

Although a right of action to recover for damages already sustained, prior to the execution of a conveyance, may well be deemed to remain in the grantor, yet a right of action or remedy for future encroachments upon the grantee's rights—as for a neglect or refusal to restore the waters of a stream to their accustomed channel—resides in the grantee of the lands. The right to have the waters of a stream flow in their natural bed, passes by a conveyance of the adjoining and subjacent soil, as a necessary and inseparable accompaniment or incident to the ownership of such adjoining soil.

39 311
17h 361
38h 616
40a 191
78a 436

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This is as absolute and fixed a right, arising out of the relations of a riparian proprietor to the waters of the stream flowing over and along his lands, as the right to the soil itself; and is never separated or disconnected from the land until the right itself becomes extinguished by twenty years adverse possession.

The right to the water is a natural, permanent and inseparable incident or accompaniment to the ownership of the soil, and is incapable of being divested by the act of any wrongdoer, until 20 years adverse enjoyment have ripened the original wrong into a legal right.

The most unquestionable evidence of the intentions of the parties to the contrary, is requisite, to justify the inference that such water-right was not designed to be conveyed with the land.

In order to estop the owner of a water right, in equity, from enforcing his right, on the ground of his knowledge of, and acquiescence in the making of expenditures and improvements thereon, by another, the consent and agreement of such owner thereto ought to be established by the clearest and most satisfactory evidence.

Where a lessee, under a lease having 18 or 14 years yet to run, diverted a water-course, and made large expenditures and improvements thereon; *Held*, that such diversion would not be presumed to have been intended to be perpetual or permanent, or extending beyond the duration of the term, so as to require a protest on the part of the owner of the land, under the penalty of being estopped in equity from afterwards objecting.

An estoppel can never arise, founded upon an omission to object to an act or a declaration, when such act is perfectly justifiable, or such declaration perfectly true.

It is because a party stands silently by and sees an injurious and unwarrantable act done to his property, or hears a false and injurious declaration made, affecting his rights, and does not protest against it, that he is regarded as tacitly acquiescing in the propriety of such act, or the truth of such declaration, and shall not be permitted thereafter to question it when such a course would work damage to an innocent party.

Notwithstanding the right to sue at law for damages, a suit in equity may be maintained, for an injunction to restrain the defendants from diverting a water-course from its natural bed or channel through or along the plaintiff's lands, and from drawing and using the water by means of such diversion, and by decree compelling the defendants to restore the waters to their natural bed or channel.

Special damages need not be averred, in order to entitle a party to an injunction, in such a case.

The interference of a court of equity, in cases of this description, may be justified on the grounds that it makes the relief final and comprehensive, avoids a multiplicity of suits, and is equally effective with an action at law in preventing the adverse possession of the defendants from ripening into a hostile and perfect title.

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APPEAL from a judgment of the Rensselaer circuit and special term, dismissing the plaintiffs' complaint with costs. The action was tried before Justice Ingraham, without a jury, at a circuit court and special term, held at the court house in Troy, on the 12th day of October, 1861. The action was brought to obtain an injunction against the defendants, restraining them from diverting the waters of the Wynant's kill, in the city of Troy, in the county of Rensselaer, from their natural bed or channel, through or along the lands of the plaintiffs, by means of a ditch or trunk, or otherwise, and from drawing and using the same by means of such diversion, and compelling the defendants to restore said waters to their natural bed or channel, and to pay the plaintiffs such damages as they had sustained by reason of such diversion, and for general relief. The plaintiffs are owners and occupants of a lot called the "Seven-acre lot," on the north side of the Wynant's kill, but whose exterior boundaries, as contained in the deed of conveyance, embrace also land on the south side of the creek. Said deed, after the description of the premises, contains the following clause: "Excepting and reserving out of the above described premises, one acre of land on the south side of the creek, and adjoining to the creek where the line crosses the said creek, unto Stephen Van Rensselaer, Esq. his heirs and assigns." This excepted acre lies on the south side of the creek in a bend of the stream, opposite to the plaintiffs' land, on the north side of the creek before mentioned, and is claimed and occupied by the defendants. The action was first tried before Justice Wright, who made a decree dismissing the plaintiffs' complaint without costs, and without prejudice to an action at law to recover damages for the alleged diversion of the waters of the Wynant's kill. On appeal, the judgment rendered by him was reversed, and a new trial granted with costs to abide the event. The case is reported in 34 *Barb.* 485-494. On the second trial before Justice Ingraham, now

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brought up for review, he made the following findings of fact and of law :

1. That the plaintiffs, by sundry conveyances, are the owners of the seven-acre lot as formerly owned by David Defreest, under conveyances executed to them in 1852 and 1856 by the devisees of David Defreest. 2. That the defendants are the owners and are in possession of the reserved acre on the south side of the creek, and adjoining to the creek, and were in possession thereof prior to the plaintiffs' conveyances, under deed from William Van Rensselaer, dated 1st February, 1847, having held the same previously under lease from S. Van Rensselaer, dated 28th November, 1832. 3. That the boundary of the defendant's land is the creek. 4. That prior to 1839 all the water of the creek which passed over the bed of the creek, excepting that what was used for the shovel factory, was returned to the creek at or near the place from which it was taken. 5. That in 1817, the seven-acre lot was leased by Defreest to Converse for thirty-four years and nine months, and that such lease was afterwards and until its expiration held and owned by the defendant. 6. That in or about the year 1839, the defendant commenced and completed an alteration in their works, by which alteration the greater part of the waters in the creek were taken, by means of a dam erected across the creek, above the lands of the plaintiffs, and were carried through an artificial channel built on the defendant's land to the defendant's works, and were not returned to the bed of the creek until they reached a point below the seven-acre lot, and that such alteration was of a permanent character. 7. That the Defreests then owned the seven-acre lot, but the same was leased to Converse and such lease was held by the defendant, and that Abraham W. Defreest, acting for himself and the other owners, assented to the diversion, urged the completion of the works intended for that purpose, and expressed his fears that this defendant had not the means to complete it. 8. That Defreest wished the completion of the works, from an excep-

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tation on his part of a large increase in population in consequence of the increased works, and of a rise in the value of his property from the increased demand therefor, which was communicated to Burden. 9. That at the time Defreest was informed of the nature of the improvements, and must have known their permanent character, and resided in the vicinity of the works. 10. That there is no evidence to show that Defreest, down to the time of the conveyances to the plaintiffs, ever objected to the diversion of the waters by the defendant. 11. That at the time of those conveyances, the diversion of the waters to the defendant's works was in full force, and that such diversion was permanent. 12. That at the time of those conveyances to the plaintiffs, the defendant claimed the right to use the water as diverted to their works with the consent of Defreest, and that such claim was adverse to any supposed right of Defreest to have the waters returned to the bed of the creek along the line of the seven-acre lot. 13. That the works of the defendant have been erected at large expense, and applied to the use of the water as diverted, after the assent of Defreest thereto. 14. That a restoration of the water to the bed of the creek would require an alteration of the wheel and other works connected therewith at a large expense. 15. That the plaintiffs or their grantors have not at any time since the expiration of the lease, had any means on the seven-acre lot for the use of the water if it had flowed through the bed of the creek. 16. That the fall of the creek on the line of the seven-acre lot from the upper to the lower boundary of such land is $5\frac{6}{10}$ feet, and would furnish a water power sufficient to run one run of stones, grinding 18 to 20 bushels per hour, or a cotton mill with 40 looms, or what would be equal to about a 20 horse power. 17. That there have been no works requiring the use of the water on the plaintiffs' land (the seven-acre lot,) erected either by Defreest or the plaintiffs, and none now exist thereon. 18. That since 1839, the waters diverted by the defendant above the seven-acre lot of

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the plaintiffs, have been returned to the creek at a point below the west line of the lot. 19. That the waters in the creek could be used for the erection of works on the seven-acre lot by the use of shafting, but that it is doubtful whether the whole power could be obtained except by running a dam across the stream. 20. That there was in 1852 and subsequently, a dam across the creek, by the shovel factory, about five feet high, which was removed about 1841 or 1842. 21. That in 1851 or 1852, the defendants enlarged their works, building their large wheel of 60 feet diameter, and the water was then taken from the reservoir dam. 22. That in order to alter the work so as to return the water to the creek at the place where it was formerly returned, the wheel must be raised $5\frac{1}{2}$ feet ; that raising the wheel would reduce the velocity of the fall of the water over the wheel, and would also deprive the defendant of two feet of water in the reservoir which they can now draw out of it.

And the justice found thereon as matter of law : 1. That the plaintiffs are the owners of the seven-acre lot on the north side of the creek, and that their title extends to the center of the creek. 2. That as such owners they are entitled to claim the flow of the water in the bed of the creek along their land, to the same extent as it existed at the time of the conveyance to them by Defreest and others. 3. That the defendants are the owners of the reserved acre lying on the south side of the creek, and that their title extends to the center of the creek. 4. That at the time when the defendants diverted the water from the bed of the creek, the same was legally done, because they owned the land on one side and held the lease on the other, and that such diversion was not an adverse possession during the continuance of the lease. 5. That at the various times when the diversion took place, although the same was done under a parol license from the owner of the land, and with knowledge of its permanent character, the acts of the owner did not operate as an estoppel to prevent him from claiming a restoration of the water

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after the termination of the lease. 6. That the diversion of the water from the bed of the creek having been made by the defendants in a permanent manner, and being held by them at the time of the conveyance to the plaintiffs, under a claim of right from the parol license of Defreest, the right to the flow of the water through the bed of the creek had ceased to be appurtenant to the seven-acre lot; and the right to reclaim the same and to compel the restoration of the water to the bed of the creek did not pass to the plaintiffs under those conveyances. 7. That the defendants have acquired no title by adverse possession to the right to divert the water from the bed of the creek. 8. That the proprietors of the land on the north side of the creek have not lost any of their rights by non user of the water. 9. That the acts of the former proprietors of the land on the north side of the creek amount to a relinquishment of their right to use such portion of the waters as were diverted above their land. 10. That where, in consequence of a parol license from the owner of the land on the north side of the creek, the defendants have executed such license in a permanent manner, and at a large expenditure of money, equity will not interfere to enable such owner or his grantees or assigns to violate his parol agreement, but will, on the other hand, enjoin an action at law if brought for such purpose. The justice was therefore of the opinion that the plaintiffs were not entitled to the relief in this action, and that the complaint should be dismissed with costs.

The plaintiffs duly and separately excepted to each and every of the aforesaid findings of fact and of law, so far as they were adverse to them; and judgment having been perfected on said findings, in favor of the defendants, the plaintiffs appealed therefrom to the general term.

D. L. Seymour and A. J. Parker, for the plaintiffs (appellants.)

W. A. Beach, for the defendants (respondents.)

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By the Court, HOGEBROOM, J. The judge who heard this cause on the second trial appears to have arrived at the following conclusions :

1. That the plaintiffs are the owners of the seven-acre lot to the center of the creek on the north side thereof, and are entitled to all the rights and privileges of riparian proprietors, as they existed at the time of the conveyance to them, in 1852.

2. That the defendants are the owners of the one acre lot to the center of the creek on the south side thereof, with like rights and privileges.

3. That the diversion of the waters of the creek by the defendants in 1839, and their continuance of such diversion till the expiration of the lease in 1852, were justifiable and legal acts, and did not constitute an adverse possession nor an estoppel upon the owner of the land during that period of time ; and that the defendants have acquired no right, by adverse possession, to divert the water from the bed of the creek since that time.

4. That the proprietors of the land on the north side of the creek have not lost any of their rights by non user of the water, and consequently have not lost the right to have the waters of the stream restored to the bed of the stream as they were accustomed to flow.

5. That although there was no adverse holding of the water right by the defendants, yet it was by the act of the defendants and with the consent and license of Defreest *permanently separated* from the *land* of the latter, and thereby ceased to be an *appurtenance* to the seven-acre lot, and did not pass to the plaintiffs by the conveyance of the Defreests to them in 1852.

6. That the division having taken place with the parol consent and approbation of Defreest, and for causes operating and expected by him to operate to the benefit of his own property, and having with like consent and approbation been made at large expense and for a permanent object, and expensive improvements of a permanent character with like knowl-

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edge and approbation, having been made by the defendants in consequence of and upon the faith of such diversion, Defreest thereby gave consent and license to such diversion and expenditures, and he and his grantees are estopped from asking the aid of a court of equity to restore the waters to their natural bed, and are on the contrary liable to an action to prevent any interference with the defendants' rights and improvements.

On the questions involved in the foregoing specifications, I think the general term on the hearing had previous to the second trial above mentioned, must be deemed to have held the following propositions:

1. That there was no sufficient evidence of any such consent or acquiescence on the part of the defendants or the plaintiffs, nor to the diversion of the water, or in or to the expenditures and improvements made by the defendants consequent thereon, as would bar their claim to have the waters restored to the bed of the stream; and no such knowledge or reason to suspect that they were intended to be permanent or perpetual, as would operate as an estoppel upon them.

2. That the plaintiffs having taken from the Defreests an absolute conveyance of the premises in 1852 without reservation, qualification, or limitation, such conveyance must be regarded as passing not only the title to the land and the water, but the water power and the rights and privileges which belonged to the grantors as riparian proprietors.

3. That the circumstances of the case justified a resort to an equitable forum to restrain the defendants from a further diversion of the water, and to compel its restoration to its natural bed or channel; and that the remedy was open to them notwithstanding the omission of the plaintiffs to appropriate the water power, hitherto, to manufacturing purposes; notwithstanding the inconsiderable amount of actual damage sustained; and notwithstanding the heavy expenditures to which the defendants might be subjected if enjoined from the further use of the diverted waters and compelled to restore them to their natural and accustomed channel.

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The principles thus enunciated must be regarded as the law of this case until overthrown by a superior tribunal. There is no occasion for their further consideration ; and whatever respect we may entertain for the views of the learned judge who determined this case on the second hearing, they must be regarded as overruled, so far as they conflict with the deliberate adjudications of the general term.

Keeping in view these suggestions, let us consider what questions remain open for consideration ; and whether in regard to any of them the evidence is sufficiently variant from what it was on the first trial, to justify the application of different rules from those which were heretofore laid down for the determination of the rights of the parties.

The points which the judge at the last hearing deemed open to discussion, and upon the strength of which he decided the case, appear to have been *three*. 1. He held that in consequence of the diversion in 1839 the water right became separated from the land and the estate therein, so that when the Defreests conveyed to the plaintiffs in 1852, although there was no adverse possession and no estoppel, and no loss of the plaintiffs' rights by non user, the conveyance did not pass to the plaintiffs all the rights which the defendants had, and especially did not pass the right to reclaim the water which had been thus diverted, nor the right to demand a restoration of it to its ancient channel. 2. That Defreest in effect consented to the diversion of the water—approved it—anticipated from the expected improvements incidental benefit to his own property ; knew or ought to have known that they would be of a permanent character ; substantially agreed that they should be made, and is (as well as his grantees) *estopped* from now objecting to them, or from seeking the relief embraced in the complaint. 3. That the appropriate remedy for the injuries sustained or apprehended by the plaintiff is an action for damages, repeated as often as circumstances shall require, and not a suit in equity to prevent the further diver-

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sion of the waters, or to compel their restoration to the bed of the Wynant's kill.

It will be seen that all of these questions were considered and disposed of in the opinion pronounced at general term; and it only remains to determine whether additional evidence has been brought to bear upon the case which should alter the result.

1. The judge at special term seems to have based his opinion that the right to the water did not pass to the plaintiffs by the conveyance from the Defreests in 1852 upon two grounds. (1.) Upon the ground that the water may be considered as at that time held by the defendants under an adverse title and hence protected to the defendants, under that section of the revised statutes which declares a grant of lands void if they are at the time in the actual possession of a person claiming under an adverse title. (1 R. S. 739, § 47.) The deed was given on the 23d of July, 1852; the lease under which the defendants had held expired on the 1st of February, 1852; the defendants had six months thereafter to remove buildings and other improvements they had made upon the premises; the defendants had made no open or notorious claim of *adverse* possession, and I think it was at least as reasonable to consider them under the evidence as tenants holding over or persons retaining possession under the title theretofore enjoyed, as to regard them as holding under an adverse title.

But conceding that the defendants might be considered as in the actual and adverse possession of the diverted water flowing over the defendants' lands at the time of the delivery of the deed, it is not so much that body of water as the water subsequently flowing in the stream above and entitled to flow down along the plaintiffs' lands, for which the action was brought, and which the plaintiffs claimed they had a right to compel the defendants to restore. It was the water *right*—the water *privilege*—which the plaintiffs claimed passed by the conveyance, and I think the authorities justified such a

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claim. (*Mason v. Hill*, 5 *Barn. & Adol.* 1. 2 *Hilliard on Torts*, 113, 114. *Stevens v. Stevens*, 11 *Metc.* 251.)

(2.) Upon the ground that the water right or privilege was a mere incident or appurtenance to the grant of the land and by the act of Burden or the defendants became *separated* from the land itself, and therefore would not pass by the conveyance. If this be sound, I do not see how any remedy for the defendants' wrongful act of diversion could ever be practically asserted. It could not be by the plaintiffs, upon the hypothesis assumed; because the right did not pass by the deed. Nor by Defreest, for such a mere incident or appurtenance must pass with the conveyance of the principal or become extinguished. A right of action to recover for damages already sustained prior to the conveyance might well be deemed to remain in the grantor; (*Baldwin v. Calkins*, 10 *Wend.* 178;) but a right of action or remedy for future encroachments upon the plaintiffs' rights—for a neglect or refusal to restore the waters of the stream to their accustomed channel—must, I think, necessarily reside in the grantee of the lands. It is this right—the right to have the waters flow in their natural bed—which passed by the conveyance, as a necessary and inseparable accompaniment or incident to the ownership of the adjoining and subjacent soil. This is as absolute and fixed a right arising out of the relations of a riparian proprietor to the waters of the stream flowing over and along his lands, as the right to the soil itself, and is never separated or disconnected from the land until the right itself becomes extinguished by twenty years' adverse possession. It is not like the case of the garden (*Doe ex dem Norton v. Webster*, 12 *Adol. & Ellis*, 442) claimed to pass by the word "appurtenances" as an appurtenant to a house, cited by the learned judge at special term; for that was the case of an accidental or casual appurtenance to real estate, which might or might not, according to the actual fact, be enjoyed with it; but *this* is the case of a natural, permanent and inseparable incident or accompaniment to the ownership of the soil, and

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incapable of being divested by the act of any wrongdoer until twenty years adverse enjoyment had ripened the original wrong into a legal right. In the case of the garden it was or was not an appurtenance, according to the fact and the intentions of the parties to the conveyance. In this case it was an inseparable incident of the ownership of the land—so declared by an inflexible rule of law—and requiring the most unquestionable evidence of the intentions of the parties to the contrary, to justify the inference that it was not designed to be conveyed. Again; I am not able to see that the learned judge has in any way distinguished the case from what it was, in this particular, when it was before us on the previous occasion; and certainly it does not seem to be distinguished from it, by any new aspect of the evidence. The question was fully considered and decided in the opinion pronounced at general term, and the question must be regarded as settled, so far as this court is concerned, until our errors (if any) are corrected by a superior tribunal.

2. The justice at special term further held that the Defreests, and consequently the plaintiffs, though not barred at law, are estopped in equity from enforcing this water right by reason of their knowledge of and acquiescence in the large expenditures and improvements which they saw the defendants originating in 1838 and 1839, and continuing afterwards. In this I think also the court below erred. (1.) I do not perceive any such preponderating evidence of acquiescence and consent as is inferred by the court. Doubtless Defreest saw the expenditures and improvements in process of being made and did not object to them. But that he gave his consent and agreement to them in any such unqualified manner as the court decide, is not, I think, a fair inference from the evidence, and is improbable in itself. Mr. Burden does not speak with great positiveness and strength upon the subject, and he is directly contradicted by Defreest. The legal presumption ought to be decidedly against the probability that a proprietor of land would thus designedly

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and gratuitously sacrifice a valuable property right; and I think the consent and agreement ought to be established by the clearest and most satisfactory evidence. I think this doctrine of equitable estoppel has been pushed quite far enough; and there is danger if it be maintained with severity, that many a man without pretensions to legal erudition, or to any thing beyond plain practical sense, will find his property vanishing away before he is aware that it is at all in danger. (2.) Why was Defreest bound to remonstrate against the acts of Burden. Burden having an unexpired lease of thirteen or fourteen years had a perfect right to do what he did. He acted with a perfect knowledge of the nature and extent of his rights, and could lawfully make his expenditures and improvements on as liberal a scale as he chose. Defreest's objections (if he had made any) would probably have been treated by Burden as unfounded, impertinent and perhaps offensive. And it seems to me remarkable that the diversion of the water by the defendants should be presumed to have been intended to be perpetual or permanent, or extending beyond the period of the lease, so as to require a protest on the part of the owner of the land, when the lessee had a perfect right to make them for a limited period, and would be chargeable with a palpable wrong if he designed them to be perpetual. It does not now occur to me that an estoppel can ever arise, founded upon an omission to object to an act, or declaration, when such act was perfectly justifiable or such declaration perfectly true. It is because a party stands silently by and sees an injurious and unwarrantable act done to his property, or hears a false and injurious declaration made affecting his rights, and does not protest against it, that he is regarded as tacitly acquiescing in the propriety of such act or the truth of such declaration, and shall not be permitted thereafter to question it, when such a course would work damage to an innocent party. I do not think the defendants are in a condition to claim the benefit of any such rule. (3.) It is not pretended that any

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of the other co-tenants who confessedly had valuable interests in this property ever gave any consent or had any knowledge of the diversion of the water, or of the improvements or expenditures made by the defendants. And I do not think Abraham W. Defreest occupied such relation to them from the mere fact that he collected their rents, (without express authority,) and paid the same over to them, that they ought to be regarded as forfeiting their estate in these premises, on account of *his* individual acquiescence or consent. He was not their general agent; certainly not their agent to sell or to sacrifice these premises. The rights of tenants in common are distinct and not identical, and the acts or admissions of one are not, by virtue of that relation, the acts or admissions of the others. (*Dan v. Brown*, 4 *Cowen*, 483.) (4.) This question was also fully considered in the opinion pronounced at general term, on the former argument, and the facts are not essentially different. The former decision must therefore be regarded as conclusive.

3. The remark last made applies, I think, with full force to the plaintiffs' title to the relief sought by the complaint. It was adjudicated when the case was formerly before us. In all its essential features the case is similar if not absolutely identical, and in the light of such authority the views of the trial judge who differs in opinion with the law thus adjudged, are of no moment. But I will briefly examine some of the positions taken by him. (1.) It is said that equity will not grant an injunction if there is an ample remedy at law. I think the rule, according to the modern decisions, is subject to some qualification; but assuming its entire correctness, is it true that here is an ample remedy at law? It is said an action at law lies to recover the damages. Perhaps this may be considered an action at law to recover the damages if it is not sustainable as an equity action; because in the demand of relief there is a distinct claim of damages to the amount of \$100, sustained by reason of the diversion of said stream, and under the rule laid down by

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the court of appeals in *Marquat v. Marquat*, (2 *Kern*. 336,) and *Emery v. Pease*, (20 *N. Y. Rep.* 62,) it is not clear that the nonsuit ought not to have been denied on that ground. If an action at law lies to recover the damages, such actions may be indefinitely repeated, and each successive day may witness the commencement of a new one. Which is least burdensome to the defendants, a single action settling the entire right and affording comprehensive relief, or a succession of suits involving the defeated party in heavy costs? So where actions at law are proper to recover damages for waste or trespass upon lands, it has been repeatedly held that courts will interfere by injunction to restrain acts of that character. (*Livingston v. Livingston*, 6 *John. Ch.* 497. *Spear v. Cutler*, 2 *Code R.* 100.)

It has been held in a case between these very parties that an injunction will issue to prevent the *obstruction* of water courses. (*Corning v. Troy Iron and Nail Factory*, 6 *How. Pr. Rep.* 89.) Nor is it entirely clear to my mind that an action at law for damages, if successful, would prevent the wrongful act of diversion from ripening into a perfect legal right. It would establish, it is true, the fact of wrongful diversion, but it would still leave the act of diversion in full force, and would not restore the waters to their ancient channel, nor interrupt the adverse occupancy of the defendants. So an action or actions at law for continued trespasses might be successfully prosecuted against a wrongdoer, who takes and holds possession of the land of another; but they would not interrupt the adverse possession, though decisive of the legal right. And it may be doubted whether the legal effect of the adverse possession would not still continue, and after the lapse of twenty years ripen into a perfect right. (2.) The question is discussed by the learned judge at special term whether *special* damages are not necessary to be averred in order to entitle a party to an injunction, but on the whole concluded to be unnecessary. Such is, I think, the course of decision in this state. But the complaint contains probably a suffi-

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cient averment of special damage (if that were necessary) when it states that by the unlawful acts of the defendants "the volume of water is diminished," "its hydraulic power destroyed or impaired to such a degree as to render it utterly insufficient and worthless," and "the plaintiffs' premises injured and their value destroyed." (3.) Again, it is said the plaintiffs' title must be clear. It is clear, and upon the evidence unquestionable. (4.) Finally, it is said that where the damage to the defendant by the injunction will be very great and no good result from it to the plaintiffs, beyond establishing a title, an injunction will not issue. I think the rule is thus too broadly stated, but to prevent an injunction both these circumstances must concur; and here they do not concur. When the case was before presented we held that "the resort to an equitable forum seems consonant to the established practice in cases of this description, makes the relief final and comprehensive, avoids a multiplicity of suits, and is equally effective with an action at law in preventing the adverse possession of the defendants from ripening into a hostile and perfect title." (*Corning v. The Troy Iron and Nail Factory*, 34 Barb. 492, 493.) To those views we still adhere, and we regard them as sustained by principle and the weight of authority. This question is largely considered and ably presented by the late Justice Story, in *Webb v. The Portland Manufacturing Co.*, (3 Sumner, 183.) The suit was in equity, seeking by injunction to prevent the defendant from diverting a water course. He holds that where there is a clear violation of a right, actual damage is not necessary to be shown *in an action of this sort*. Nominal damages will at all events be awarded, and especially "whenever the act done is of such a nature as that by its repetition or *continuance* it may become the foundation or evidence of an adverse right." He adds, "I know of no more fit case for the interposition of a court of equity, by way of an injunction, to restrain the defendant from such an injurious act. If there be a remedy for the plaintiffs at law, still that rem-

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edy is inadequate to prevent and redress the mischief." It is held as proper ground for the interference of a court of equity in cases of this description, that it will prevent a multiplicity of suits. (*Angell on Water Courses*, §§ 449, 450. *Story's Eq. Jur.* § 901.) Again, it is said, "cases of a nature calling for the like remedial interposition of courts of equity are the obstruction of water courses, the diversion of streams from mills, &c." (2 *Story's Eq. Jur.* 241, notes 1, 2. § 928, p. 243.)

I do not deem it necessary to consider the question of the trivial damages hitherto sustained by the plaintiffs, the expensive improvements made by the defendants, and the large expenditures which will be necessary to restore the diverted waters to their ancient channel, in case the plaintiffs' action is sustained. They were all fully considered in the former decision, (*Corning v. Troy Iron and Nail Factory*, 34 *Barb.* 492,) and need not be here repeated. I think the expenditures necessary to restore the waters to the bed of the stream will not be so great as apprehended, and the defendants can be protected from unnecessary damage by allowing them one year, as before, to effect the restoration of the water, and adapt their works to the new condition of things.

It would have been better, in my opinion, if the parties, after the former adjudication, had put the case in a shape to have our decision reviewed by the court of appeals without further litigation and expense; but as they have not chosen to do so they must abide the issue.

In my opinion the judgment of the circuit and special term should be reversed and a new trial granted, with costs to abide the event.

[ALBANY GENERAL TERM, December 1, 1862. *Hogeboom, Peckham and Miller, Justices.*]

WENDELL vs. THE MAYOR, RECORDER &C. OF THE CITY OF TROY.

Where municipal corporations or individuals are charged with a duty, as in the case of streets or highways, with the duty of keeping them in repair and exercising a general oversight in regard to their condition and safety, they, or the body they represent, are liable for all injuries happening by reason of their negligence.

They are bound to keep the streets and highways in a proper state of repair, and free from all obstructions or defects in the road bed which vigilance and care can detect and remove; and this whether or not the work or repairs are being done by a contractor under them, the negligence of whose servants causes the injury complained of.

They may, under certain circumstances, be temporarily exempt from liability where repairs or other work and labor in the street are performed by contractors for the work, and the injury complained of occurs in the progress of the work by recklessness or negligence on the part of the servants of those contractors.

In regard to streets and highways, their use is designed for the public, for purposes of passage, travel and locomotion; and the use of them by an individual simply for his own convenience and accommodation unaccompanied by the public uses just mentioned, as for drains, sewers, vaults or cess-pools, is unauthorized and essentially a nuisance, and makes the party building or maintaining such nuisance liable for all damages sustained in consequence of the improper appropriation of the street or highway to such mere personal use.

The public body, represented by such corporation or officer, is also, in such case, responsible for injuries thus occasioned, because it was illegal and improper and a breach of duty in them to allow a public thoroughfare to be thus diverted to a mere private use.

This liability is absolute and complete notwithstanding the work may have been done with care and the structure erected in an apparently proper manner; because its erection was in itself unlawful, and no amount of care or labor bestowed could sanction such illegal appropriation of the street or highway.

If such work is for any reason tolerated by the public authorities, it is their duty to exercise a supervision over its construction and condition, and it is negligence and a breach of duty in them to omit to exercise such supervision.

If such supervision is exercised, but not to such an extent as is demanded by proper and reasonable care, nor so as to secure the safety of the traveling public, the corporation or person required to exercise such supervision is guilty of negligence, and the injuries arising from such lack of efficient supervision and care are injuries for which they are responsible.

If the injury results from some inherent defect or vice in the unauthorized

39	329
130a	286
39	329
3h	514
37h	50
43k	261
74a	274
82a	281

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structure itself, or the mode of constructing it, so as not to be apparent even to a careful external observer, the public or public authorities are nevertheless liable, 1. Because the structure was under any circumstances unauthorized; and 2. Because the exercise of competent care and vigilance would have avoided such defects in the structure or mode of construction as would result in injury to the traveling public.

Medical testimony, as to the personal injuries likely to be produced under a given state of facts, is admissible, where the witness states the precise facts on which he bases his opinion, and the court does not withdraw from the jury the right or liberty to consider whether those facts were established by the testimony.

A PPEAL from a judgment at the circuit and from an order of the special term denying a new trial. The action was brought to recover damages for injuries occasioned to the plaintiff's back on the 2d of October, 1857, by reason of the negligence of the defendants in not keeping River street, in the city of Troy, in a safe and proper condition, by which negligence a drain running diagonally from Mrs. Birge's house on the east side of River street, across River street into the drain of Hoosick street, gave way while the plaintiff was passing south through River street, near Hoosick street, with his team and truck, lightly loaded. The drain caved in about three feet deep by fourteen feet in length; one side of the truck went down, the tongue broke, threw one of the horses, and the plaintiff was precipitated head foremost between the horses, his feet resting on the hounds, his body extended, and his hands caught in the harness between the horses, near their heads, his person was unsupported except his hands and feet, thereby injuring his spine and back, so that he is mostly unable to labor, and he suffers constant pain, and is deprived of sleep, and is unable to attend to business to any considerable extent. Such is claimed by the plaintiff to be the legitimate effect of the testimony, and there was considerable evidence in support of such a conclusion. The defendants allege the drain was constructed across the street by one Mrs. Birge, who died before the trial.

The complaint, after charging the corporate character, and

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the duty of the defendants to keep streets and drains in repair, alleges, that in October, 1857, the defendants "dug, or caused to be dug, a trench in River street in the said city, and therein constructed a drain, for the purpose of draining portions of the streets in said city," and that the same was negligently constructed, of insufficient materials and in an improper manner; and that while the plaintiff was carefully driving upon said street the drain caved in, by which the plaintiff was thrown from his wagon and injured. The proof showed that the drain was constructed by Mrs. Birge, to connect her cellar with the Hoosick street drain, under a permission from the common council of the city, given by resolution which directed "the work to be done under the direction of the city commissioner." The street inspector was occasionally present during the progress of the work, but gave no directions about the drain. He drew away some of the dirt that came out of the drain.

It appeared that River street ran north and south; that the drain commenced on the east side, ran across the street, and then north about fifty feet, on the west side; that there was no external indication of any defect in the drain, or in the street; that the drain was filled in the usual manner, being rounded above the general level of the street, and was, according to some of the evidence, to all appearance solid and secure, and according to other portions of the testimony the ground had settled where the drain was, some six inches before the casualty occurred.

The defendant moved for a nonsuit, which was denied. After the testimony was closed and both parties had rested, the defendants' counsel again moved for a nonsuit on the grounds previously stated, and in addition because it appeared that the drain in question was not constructed by the defendants or their officers, or any or either of them, and the complaint counts entirely on an unskillful or imperfect construction of the drain. The court overruled the motion and the defendants' counsel excepted. The court then charged

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the jury, among other things, that they should consider and pass upon these points: 1st. Was the drain negligently and improperly constructed? 2d. Was the plaintiff injured by reason of such defect and insufficiency, and without any contributing negligence on his own part? 3d. Was the drain constructed by the authority and under the supervision of the common council; and that if they should find affirmatively on all of these points the plaintiff would be entitled to recover. In regard to the third question his honor charged that the resolution of the common council was evidence of their consent, and that it was the duty of the common council to send a competent officer to see that the drain was properly constructed. And the defendants' counsel excepted to the third proposition so submitted to the jury, and to all that portion of the charge as above stated which followed thereafter. The defendants' counsel then requested the court to charge the jury in accordance with the following propositions: 1. That if the jury find from the evidence that the drain in question was constructed by a private citizen, under the authority of the resolution of the common council given in evidence, and that the work was not done or superintended by the defendants, or any or either of their authorized officers; and that the street was not dangerous nor out of repair at the place and time of the accident, the defendants are not responsible for any negligence or unskillfulness, or imperfection in the construction of the drain. The court declined to charge in this way, and charged that if the defective and negligent construction of the drain made it unsafe in fact to go over the road, the defendants are liable for an injury occasioned thereby to a traveler who is himself guilty of no negligence. The defendants excepted to such refusal and also to such charges as made. 2. That under the circumstances above stated, the defendants are not liable for any injury which may have happened to the plaintiff, by reason of any negligence or unskillfulness in the construction of the drain, nor for any imperfection in it not apparent from ex-

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ternal examination. The court declined so to charge, or otherwise than as he had charged, and defendants excepted. 3. That under the evidence the defendants were not liable for any negligence or unskillfulness in the construction of the drain nor for any injury to the plaintiff therefrom. His honor declined so to charge, and defendants excepted. 4. That under the evidence the defendants were not charged with the duty of directing or superintending the construction of the drain. His honor refused so to charge, and defendants excepted. 5. That if any injury happened to the plaintiff, by reason of a hidden imperfection in the drain, not known to the defendants, or to either of their officers, and which reasonable diligence could not discover, the defendants were not liable therefor. To this his honor remarked that it was true, as a general principle, but that if the drain was constructed under the resolution the defendants were bound to see to its proper construction, and defendants excepted to the instruction as given. 6. That under the evidence the defendants were only charged with the duty of keeping the street in proper repair, and if at the time and at the place of the accident, the street was in proper repair, so far as could be discerned from diligent external examination, the defendants were not liable. The court refused so to charge, and defendants excepted. 7. That the defendants were not liable for any injury to the plaintiff, through any defect in the street, unless they, or some or one of their officers, had notice thereof, or could have discovered the same by the exercise of proper diligence and care. The court refused to charge otherwise than already charged on that subject, and defendant excepted. 8. That the defendants were not liable to the plaintiff for any injury happening through any defect in the street, without proof that they had funds on hand legally applicable to the repairs of such street. His honor charged that his proposition did not apply to the case on trial. The defendant excepted to the refusal to charge, and also to such ruling. 9. That the plaintiff was not entitled to recover without

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proving that the defendant, through some or one of its officers, was guilty of negligence, by which the plaintiff was injured. In regard to this proposition, his honor said it was true generally. He declined, however, to modify his charge, and added that the city was guilty of negligence in not sending a proper and competent officer to oversee this work, if they did not send such a one. And defendant excepted to such refusal and also excepted to such charge as made. 10. That if the plaintiff, by his own negligence, materially contributed to the injury of which he complains, the defendants were not liable. 11. That under the pleadings the defendants were not liable for any cause, except for negligence, unskillfulness or imperfection in the construction of the drain. 12. That the defendants were not liable in this action for any injury to the horse or wagon of the plaintiff. 13. That neglect of official duty cannot be presumed, but must be proven. On the 10th, 11th, 12th and 13th propositions, submitted by defendant's counsel, as above, the court charged affirmatively, as requested. 14. That under the evidence the defendants could not be held liable in any event, unless the jury found that the drain was built in strict pursuance of the terms of the license from the common council, and under the supervision of the officer named in such license. In regard to this proposition his honor charged yes, substantially. The common council must either have the supervision of the work, or an opportunity to supervise it. The latter would be the same thing. To the latter portion the defendant excepted. 15. That there being no proof on the subject, the jury had no right to presume that the street inspector, Cutter, could exercise the supervisory authority, which by the license was intrusted to the city commissioner only. His honor said in regard to this that the jury need not presume any thing on the subject; and added the same modification as was applied to the last proposition, and the defendant excepted. The jury found a verdict for the plaintiff for the sum of \$5000.

On the coming in of the verdict the defendant's counsel

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moved for a new trial upon the minutes of the court, and the same was denied. And on motion, it was ordered that the defendants have sixty days within which to make a case or exceptions. The defendants appealed from the judgment, and from the order denying a new trial.

S. F. Higgins, for the plaintiff (respondent.)

W. A. Beach, for the defendants (appellants.)

By the Court, HOGBROOM, J. I think the present state of adjudication in regard to the liability of municipal corporations and public officers, for injuries occurring by negligence, authorizes us to lay down the following propositions:

1. Where municipal corporations or individuals are charged, as in the case of streets or highways, with the duty of keeping them in repair and exercising a general oversight in regard to their condition and safety, they or the body they represent are liable for all injuries happening by reason of their negligence. (*Mayor of New York v. Furze*, 3 Hill, 612. *Weet v. Trustees of Brockport*, 16 N. Y. Rep. 163, n. *People v. Corporation of Albany*, 11 Wend. 539. *Rochester White Lead Co. v. City of Rochester*, 3 Comst. 463. *Lloyd v. Mayor of New York*, 1 Selden, 369).

2. They are bound to keep the streets and highways in a proper state of repair and free from all obstructions or defects in the road bed which vigilance and care can detect and remove; and this whether or not the work or repairs are being done by a contractor under them, the negligence of whose servants causes the injury complained of. (*Storrs v. City of Utica*, 17 N. Y. Rep. 105, 106, 108, 109. *Hutson v. Mayor of New York*, 5 Seld. 163. *Hickok v. Village of Plattsburgh*, 16 N. Y. Rep. 161, n.)

3. They may under certain circumstances be temporarily exempt from liability where repairs or other work and labor in the street are performed by contractors for the work, and

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the injury complained of occurs in the progress of the work by carelessness or negligence on the part of the servants of those contractors. (*Pack v. Mayor of New York*, 4 *Seld.* 222. *Kelly v. Mayor of New York*, 1 *Kern.* 432. *Blake v. Ferris*, 1 *Selden*, 48. *Norton v. Wiswall*, 26 *Barb.* 618.)

4. In regard to streets and highways their use is designed for the public, for purposes of passage, travel and locomotion; and the use of them by an individual simply for his own convenience and accommodation, unaccompanied with the public uses just mentioned, as for drains, sewers, vaults or cess-pools, is unauthorized and essentially a nuisance, and makes the party building or maintaining such nuisance liable for all damages sustained in consequence of the improper appropriation of the street or highway to such mere personal use. (*Congreve v. Smith*, 18 *N. Y. Rep.* 79. *Dygart v. Schenck*, 23 *Wend.* 446. *City of Buffalo v. Holloway*, 3 *Selden*, 493. *Congreve v. Morgan*, 5 *Duer*, 496.)

5. The public body, represented by such corporation or officer, is also, in such case, responsible for injuries thus occasioned, because it was illegal and improper and a breach of duty in them to allow a public thoroughfare to be thus diverted to a mere private use. (*Conrad v. Trustees of Ithaca*, 16 *N. Y. Rep.* 158, 161 and note. *Hart v. City of Brooklyn*, 36 *Barb.* 227. *Bailey v. Mayor of New York*, 3 *Hill*, 531. 2 *Denio*, 433. *Congreve v. Morgan*, 5 *Duer*, 495. *Mayor of Albany v. Cunliff*, 2 *Comst.* 174. *Ellis v. Sheffield Gas Consuming Co.*, 22 *Eng. Law and Eq. Rep.* 198. *Nelson v. Vermont and Canada R. R. Co.*, 26 *Verm. R.* 717. *Hutson v. Mayor of New York*, 5 *Selden*, 163.)

6. I think this liability is absolute and complete, notwithstanding the work may have been done with care and the structure erected in an apparently proper manner, because its erection was in itself unlawful, and no amount of care or labor bestowed could sanction such illegal appropriation of the street or highway. (*Conrad v. Trustees of Ithaca*, 16 *N. Y. Rep.* 158, 161, and note.)

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7. If such work is for any reason tolerated by the public authorities, it is their duty to exercise a supervision over its construction and condition, and it is negligence and a breach of duty in them to omit to exercise such supervision. (*Storrs v. City of Utica*, 17 N. Y. Rep. 108-9. *Hickok v. Village of Plattsburgh*, 16 id. 161, and cases last cited.)

8. If such supervision is exercised, but not to such an extent as is demanded by proper and reasonable care, nor so as to secure the safety of the traveling public, the corporation or person required to exercise such supervision is guilty of negligence, and the injuries arising from such lack of efficient supervision and care are injuries for which they are responsible. (*Storrs v. City of Utica*, 17 N. Y. Rep. 108-9. *Hickok v. Village of Plattsburgh*, 16 id. 161.)

9. If the injury results from some inherent defect or vice in the unauthorized structure itself, or the mode of constructing it, so as not to be apparent even to a careful external observer, the public or public authorities are nevertheless liable ; 1. Because the structure was under any circumstances unauthorized ; and 2. Because the exercise of competent care and vigilance would have avoided such defects in the structure or mode of construction as would result in injury to the traveling public. (*Storrs v. City of Utica*, 17 N. Y. Rep. 106. • *Conrad v. Trustees of Ithaca*, 16 id. 158. *Congreve v. Morgan*, 5 Duer, 495. *Hart v. City of Brooklyn*, 36 Barb. 227.)

The rules thus enunciated, and which I think, all of them, rest on well considered adjudications or sound principles, dispose of all the more material questions presented in the present case, and I believe cover all the essential matters contained in the charge or refusals to charge on the part of the court. They embrace all those which rest upon the idea of a supposed defect in the construction of the drain or sewer not obvious or open to external examination ; because the erection was unlawful, inasmuch as competent care would have cured or obviated the defect, and the omission to bestow such care was of itself an act of negligence. It is not like the case

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of a hidden or unavoidable imperfection or defect in the earth itself, in its natural state below the surface, in the performance of labor and repairs necessary for the public benefit, against which competent care and supervision could not provide; because in such case the work done was proper in itself, the use to which the highway was subjected was a lawful use, and the defect or imperfection such as could not have been anticipated, and against which the exercise of all reasonable care and circumspection was insufficient to protect the public.

These rules also embrace the case of a neglect to provide a competent person to supervise the work.

The lack of funds was also, I think, no defense, as there was no proof that such lack existed in point of fact; and as the defendants were provided with abundant resources and remedies to supply themselves with the funds necessary for the accomplishment of the work.

The evidence as to the proper mode of constructing and laying down drains, by persons expert in that business, was, I think, properly received.

The medical testimony as to the injuries likely to be produced under a given state of facts was, I think, properly admitted. The witness stated the precise facts on which he based his opinion, and the court did not withdraw from the jury the right or liberty to consider whether these facts were established by the testimony. (*People v. Lake*, 12 *N. York Rep.* 358. *Goodrich v. The People*, 3 *Parker*, 622.)

The motion for a new trial upon the evidence is not urged on the appeal, and none of the exceptions appear to me to be well taken.

I am of opinion that the order denying a new trial, and also the judgment of the circuit court, should be affirmed.

[ALBANY GENERAL TERM, December 1, 1862. *Hogeboom, Peckham and Miller*, Justices.]

FAKE vs. WHIPPLE and GRANT.

A town collector, on receiving a tax warrant, is *prima facie* chargeable with the amount of money therein directed to be collected by him; and it is incumbent upon him to discharge himself in some one of the modes pointed out by the statute or recognized by the law.

If he fails to execute the warrant by returning to the county treasurer all the sums therein directed to be paid to such treasurer, he is *prima facie* chargeable with the amount of the deficiency; and if the sheriff, on a warrant being issued to him, for that purpose, by the county treasurer, is not able to collect the deficiency out of the collector's property, the sureties in the collector's bond are *prima facie* liable for the debt.

In an action upon the collector's bond, for his default in not paying over to the county treasurer all the moneys directed in the tax warrant to be paid to him, the burthen of proof is upon the defendants to show that the failure to pay arose from the collector's inability to obtain the sum deficient, except by compulsory measures, against the tax-payers.

Where the default of the collector is sought to be excused on the ground that the tax warrant was not delivered to him within the time contemplated by law, so as to enable him by compulsory measures to enforce the same against delinquent tax-payers, it is obligatory upon the defendants to show that the defalcation arose from the inability of the collector to collect, by reason of the lapse of the return day of the warrant before he was entitled to institute proceedings for the forcible collection of the taxes. If they fail to do so, the sureties are liable upon the bond.

Sureties, after having executed a bond in which their principal is recited as being collector of the town, and as having received, as such, the assessment roll of the town for the purpose of collecting the taxes therein named, are estopped from denying the fact that he was such collector, *it seems*.

Where no exception is taken by the successful party to a finding of the court below upon a question of fact, nor any attempt made to review it in any mode known to the law, for the purposes of the hearing upon appeal the finding must be taken as true, and the party will be precluded from insisting upon the contrary.

APPEAL from a judgment at the circuit. The action was brought by the supervisor of the town of Lansingburgh, in the county of Rensselaer, against Henry S. Tracy, collector of said town, and Jonathan E. Whipple and Isaac T. Grant, the sureties of said collector in his official bond. The action was originally brought by James I. Adams, as supervisor of said town; and the appellant, as successor of Adams in that office, is substituted as plaintiff. The plain-

39 339
39a 394
107a 487

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tiff claims to recover the sum of \$860, on said bond, as the amount for which the collector is in default, and for which he and his sureties are liable on said bond. The cause was tried before Hon. GEORGE GOULD, one of the justices of this court, without a jury, in the month of February, 1860, at the Rensselaer circuit. On the trial it was admitted that James I. Adams was duly elected supervisor of the town of Lansingburgh, for the years 1857 and 1858, and was duly qualified; and that Henry S. Tracy was also duly elected collector of said town, for said years, and was duly qualified; and these facts were found by the court.

The due execution of the bond in suit, by the collector and his sureties, which was for the faithful execution by said Tracy of the duties of collector, and was dated on the 23d of January, 1858, and the approval of the bond by the supervisor, and his filing it with the county clerk were proved, and were found by the court. The bond was given in evidence without objection. The corrected assessment roll, with the warrant annexed, duly signed and sealed, for the town of Lansingburgh, for the year 1857, was proved and given in evidence. And the same was proved to have been delivered by the clerk of the board of supervisors of Rensselaer county, for the year 1857, to James I. Adams, then supervisor for the town of Lansingburgh. The assessment was completed by the board of supervisors on the 20th of January, 1858, on which day the board adjourned. On or about the 23d of January, 1858, and after the bond executed by Tracy and his sureties had been delivered to Adams, the supervisor, and after Adams had stated to Tracy his approval of the sureties, and that they were *satisfactory*, the supervisor delivered the corrected assessment roll, and warrant annexed, to the collector. The warrant directed the payment of the moneys, therein specified to be made by the collector, on or before the first day of February then next. The bond, after having been delivered to Adams, the supervisor, was retained in his possession until 27th May, 1858, when he

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signed his approval on it and filed it with the clerk of Rensselaer county, who entered it in the book kept for that purpose in his office. On the 19th day of January, 1858, the board of supervisors passed a resolution, extending the time for the collection of taxes in the towns of the county of Rensselaer, until the first day of March, 1858, *provided* the collectors should *pay* in to the county treasurer all moneys by them received at the expiration of the first *thirty days* after receiving their warrants. Tracy, the collector, was informed of this resolution. After receiving the warrant, the collector proceeded to collect the taxes under it; and a considerable amount was collected in the month of February, 1858. They appear to have been voluntary payments. The warrant required him to collect and pay over to the *county treasurer* the sums of \$4309.42 and \$8866.93, amounting in all to the sum of \$13,176.35. He proved on the trial, by receipts of the county treasurer, only the following sums to have been paid to the latter at the dates, as follows:

March 3, 1858,	\$7485 80
April 12, 1858,	4531 73
May 14, 1858,	130 32

Amounting in all to \$12,147 85

Being less than the amount required, by \$1028.40; and it was admitted "*that the collector, Tracy, failed to execute the warrant, (by returning to the county treasurer all the sums therein directed to be paid to the county treasurer,) to the extent of \$860.*" On the 4th of June, 1858, the treasurer of Rensselaer county issued his warrant to the sheriff of that county for the collection of \$860, the amount of the defalcation of the collector. On the 8th June, 1858, the sheriff returned the warrant unsatisfied, for want of goods, etc., whereon to levy, he having in vain endeavored to collect the money as directed by the warrant. After the return of the warrant of the county treasurer unsatisfied, the supervisor, having been notified of the fact by the treasurer,

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commenced this suit. The judge dismissed the complaint as to the sureties, principally on the ground that the warrant was not delivered to the collector within the time contemplated by law, so as to enable him, by compulsory measures, to enforce the same against delinquent tax-payers. The plaintiff duly excepted.

A judgment was entered against Henry S. Tracy, by default, for \$986.12, damages and costs; and as to the defendants Whipple and Grant, the complaint was dismissed, with costs to those defendants. From this judgment the plaintiff appealed to the general term.

D. L. Seymour, for the plaintiff, (appellant.)

W. A. Beach, for the defendants, (respondents.)

By the Court, HOGEBOM, J. I am of opinion that the collector on receiving the tax warrant is prima facie chargeable with the amount of money therein directed to be collected by him; and that it is incumbent upon him to discharge himself in some one of the modes pointed out by the statute or recognized by the law. As soon as such warrant is delivered, an account thereof is required by law to be transmitted by the board of supervisors to the county treasurer, "and the county treasurer on receiving such accounts shall charge to each collector the sums to be collected by him." (1 R. S. 5th ed. 915, § 37.) The collector on paying over the sums by the tax warrant directed by him to be paid, is to take duplicate receipts—"one of which duplicates shall be filed by the collector with the county treasurer, and shall entitle him to a credit on the books of the county treasurer for the amount therein stated to have been received by the county, and no other evidence of such payment shall be received by the county treasurer." (1 R. S. 5th ed. 920, § 15. See also *Muzzy v. Shattuck*, 1 Denio, 233.) If the collector neglect or refuse to pay the sums required by the war-

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rant to be paid by him, or to account for the same as unpaid, the county treasurer is required to issue his warrant to the sheriff to collect the deficiency out of the property of the collector. (1 R. S. 5th ed. 222, § 26.) If the sheriff is unable to collect the whole of such deficiency, he is to make return accordingly, and the county treasurer is thereupon to notify the supervisor, who is then required to put in suit the collector's bond, and is entitled to recover the amount of such deficiency, with costs of suit. (1 R. S. 5th ed. 923, §§ 29. 30.) "If any of the taxes mentioned in the tax list annexed to his warrant shall remain unpaid, *and the collector shall not be able to collect the same*, he shall deliver to the county treasurer an account of the taxes so remaining due, and upon making oath before the county treasurer, or, in case of his absence, before any justice of the peace, that the sums mentioned in such account remain unpaid, and that he has not, upon diligent inquiry, been able to discover any goods or chattels belonging to or in the possession of the persons charged with or liable to pay such sums, *whereon he could levy the same*, he shall be credited by the county treasurer with the amount thereof." (1 R. S. 5th ed. 921, § 19.)

In this case it was admitted by the defendants, on the trial, "that the collector, Tracy, failed to execute the warrant, (by returning to the county treasurer all the sums therein directed to be paid to the county treasurer,) to the extent of \$860." He was therefore *prima facie* chargeable with that sum, and the sheriff, not having been able to collect the same out of his property, his bond was properly put in suit, and the obligors therein were *prima facie* liable for the debt.

It is insisted on the part of the defendants that inasmuch as the warrant was not received by the collector till the 23d of January, 1858, and by its terms was returnable on the first of February succeeding, the collector had not time to enforce the collection of the taxes before the return day of the warrant, inasmuch as it would require six days, at least,

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to make such compulsory collection after the expiration of the thirty days allowed for voluntary payments, (1 *R. S.* 5th ed. 917, 918, §§ 1, 7, 8,) and as he would have no right, any more than a constable or a sheriff, to make a *levy* under his warrant after the return day had passed.

I think the answer to this is, 1. That for aught that appears he had received this sum of \$860, in voluntary payments from the tax-payers, before (or after) the 1st of February, 1858; and that the *burthen of proof* lay upon *him* to show that the failure to pay over the \$860 arose from his inability to obtain that sum except by compulsory measures against the tax-payers. 2. That he could probably have entitled himself to a credit with the county treasurer for this sum of \$860, (if, in fact, arising from inability to collect, by levy and sale of property, for want of authority by reason of lapse of time,) by making oath as to such *inability* under the 19th section, already quoted. I say *probably*, because there may be some question whether the section contemplates an inability to collect by levy and sale, on account of the return day of the warrant having passed; and yet it would be true that in such a contingency he had "not, upon diligent inquiry, been able to discover any goods or chattels belonging to, or in the possession of, the persons charged with or liable to pay such sums, *whereon he could levy the same.*" In *Van Rensselaer v. Snyder*, (3 *Kern.* 299,) the court of appeals held that the section of the revised statutes which provided for an ejectment suit by a landlord, where a half-year's rent was in arrear, "and no sufficient *distress* can be found on the premises to satisfy the rent due," was applicable to and authorized an action of ejectment in a case arising after the abolition of distress for rent, by the act of 1846, notwithstanding there might be upon the premises a sufficiency of goods and chattels to satisfy the rent, and which, but for the abolition of the right of distress, might have been distrained for that purpose. The decision was put upon the ground that there was not upon the premises suffi-

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cient property "subject by law to be distrained and sold in satisfaction of the rent in arrears." (P. 303.) A similar train of reasoning would lead to the conclusion, in this case, that to prevent the collector from obtaining credit for the deficiency of \$860, there must not only have been sufficient goods and chattels to satisfy the tax, but sufficient at the time he was authorized to levy, subject by law to be levied upon and sold in satisfaction of the taxes in arrear. At all events, I think it was obligatory upon the defendants to show that the defalcation of the collector arose from his inability to collect, by reason of the lapse of the return day of the warrant before he was entitled to institute proceedings for the forcible collection of the taxes. Failing to do so, I think the defendants were liable, unless they are excused for some other reason.

It is claimed by the defendants that Tracy never became collector, and, therefore, that they are not liable for his defalcations. It may well be doubted whether, after having executed a bond in which he is recited as being collector, and as having received, as collector, the assessment roll of the town of Lansingburgh for the purpose of collecting the taxes therein named, they are not estopped from denying that fact. (*Hall v. Luther*, 13 *Wend.* 491. *People v. Falconer*, 2 *Sandf.* 81. *Lee v. Clark*, 1 *Hill*, 56.) But, I think, for another reason the defendants are not in a situation to raise the point. They succeeded on the trial in the court below, and they rest satisfied with the decision there, which was, among other things, that Tracy for the years 1857 and 1858 was collector of the town of Lansingburgh, duly qualified and acting as such collector. No exception has been taken by the defendants to this finding, nor any attempt made to review it in any mode known to the law. For the purposes of this hearing it must therefore be taken as true, so far as it has been submitted to by the successful party at the trial. For if the judge had not been with the plaintiff in that particular, for aught we know, the plaintiff might have supplied

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other evidence, or the admissions of the defendants of that fact. The defendants are therefore precluded from insisting upon that point.

There are no other questions which seem to be important to be examined; and inasmuch as the court below decided that the assessment roll and warrant were void, because not delivered within the time contemplated by law, and necessary to justify the compulsory collection of the taxes, and also decided that the defendants, Whipple and Grant, were not liable in this action, and that, as to them, the complaint should be dismissed; I am of opinion that the judgment of the circuit court should be *reversed*, and a new trial granted, with costs to abide the event.

[ALBANY GENERAL TERM, December 1, 1862. *Hogeboom, Peckham and Miller*, Justices.]

DECKER vs. ANDERSON and SNYDER.

It is no defense to an action against sureties in an undertaking given on commencing an action to recover the possession of personal property, under the code, that having been excepted to by the defendant in that action, they failed to justify.

The defendant's proceeding in the replevin suit, after excepting to the sureties and their failure to justify, and especially his institution of an action upon the undertaking, may be regarded as an election to *waive* the exception to the sureties, *it seems*. *Per HOGEBROOM, J.*

Where the promise, in an undertaking, is to the defendant—to return the property if a return shall be adjudged, and to pay him any judgment he may recover—an action may be brought upon the undertaking, by the defendant, without any assignment thereof to him.

MOTION for a new trial, on a bill of exceptions. The cause came on for trial at the Columbia circuit in September, 1861, when the presiding justice ordered a verdict for the defendants, to which the plaintiff's counsel excepted. The action was brought upon an undertaking executed by

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the defendants and taken by the sheriff of Columbia county at the commencement of a suit to recover the possession of personal property, once known and well known as an action of replevin. The plaintiff here was the defendant in that suit. The defendants undertook and became bound for the prosecution of said action "and for a return to the said defendant of said property if a return should be adjudged, and for the payment to the defendant of any such sum as may for any cause be recovered in said action, against the plaintiff." In due time Decker excepted to the sufficiency of said sureties, and they never justified. Yet Decker appeared and answered in said action, and on the trial obtained a verdict and perfected judgment, and after an execution returned unsatisfied, brought this action against the sureties in said undertaking. The justice decided that the defendants were not liable to the plaintiff, on the facts, and ordered a verdict accordingly.

J. C. Newkirk, for the plaintiff.

R. E. Andrews, for the defendants.

PECKHAM, J. The judge at the circuit undoubtedly regarded this undertaking as analogous to special bail, who have been held to be not liable if excepted to and they fail to justify. But special bail could not set up such a defense by plea. Their remedy was by motion to have an exoneration entered on the bail piece. (*Van Duyne v. Coope*, 1 *Hill*, 557. *Humphrey v. Liette*, 4 *Bur.* 2107.) "The bail are liable so long as their names remain on the bail piece." (1 *Arch. Pr.* 310. See also *Flack v. Eager*, 4 *John. R.* 185; *Thorp v. Faulkner*, 2 *Cowen*, 514; 1 *id.* 54.) The analogy in this respect does not hold good, if the defendants here can set up such exception as a defense by plea.

But I think this question is substantially settled by this court in *Van Duyne v. Coope*, (1 *Hill*, 557,) before cited, where the sureties in a replevin bond taken by the sheriff, at

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the commencement of the suit, under the revised statutes, were held liable though they had been properly excepted to and had failed to justify. The action was there brought on the bond by the defendant as assignee of the officer in the replevin suit, after he had recovered judgment therein.

The revised statutes also provide that if such exception were made and the sureties failed to justify, the sheriff should be "liable to the defendant," for their sufficiency, "as now provided by law." (2 *R. S.* 527, § 33.) If no exception were taken to the sufficiency of the sureties, the revised statutes also provided that the sheriff should be discharged from all liability for their sufficiency, and the bond thenceforth should be held by the sheriff as security for the defendant, and should be assigned to him if he recovered judgment. (*Id.* § 32.) The provisions of the code are very similar to those of the revised statutes, except that an "undertaking" is now substituted for a bond. (*Code*, § 209.)

No assignment of the undertaking is necessary to the plaintiff in this action, as it promised expressly to him, the defendant in the replevin suit, to return the property if a return should be adjudged, and to pay to him any judgment he might recover therein. No difference whatever, in principle, is perceived in the two cases. By the code the sheriff is also made responsible for the sufficiency of the sureties, if excepted to, unless they justify, &c. (§ 210.)

It is right that the sureties should be liable to the sheriff, or to the defendant in the replevin suit. That is clearly contemplated by the statute, and as the undertaking expressly promises to the party, there would seem to be no reason why he should not sue, even though he may have an additional remedy in case the sureties shall ultimately prove insufficient.

A new trial is therefore ordered ; costs to abide the event.

HOGEBOM, J. George Flouton, on commencing an action of replevin under the code, against Abraham Decker, in which the immediate delivery of the property was claimed by

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him, procured the usual undertaking under section 209 of the code, to be executed by the present defendants in the sum of \$800, for a prosecution of the action and for a return of the property to the defendant if a return should be adjudged, and for the payment to the defendant of such sum as might for any cause be recovered in said action against the plaintiff. The action was subsequently prosecuted, and resulted in a judgment for the defendant Decker against the plaintiff Flouton, therein. Execution was duly issued thereon and returned unsatisfied, and thereupon this action was commenced by Decker against the present defendants, sureties in the replevin undertaking, to recover the amount of the judgment in the replevin suit. The defense is, that the defendant Decker being dissatisfied with the sureties in the undertaking, duly excepted to them; that notice of justification by the sureties was thereupon given; that at the time and place named in the notice they refused or omitted to justify, and have never since done so; and that the defendant subsequently proceeded in the suit without any waiver of the exception. On this state of facts the sureties claim that they have been rejected by the defendant and are not liable to him in this action; and this is the question to be determined.

Section 210 of the code provides that under such a state of facts as has just been mentioned, "the sheriff shall be responsible for the sufficiency of the sureties," "until they shall justify or new sureties shall be substituted and justify." And it would seem to be clear that Decker would have the right to hold the *sheriff* responsible. The plaintiff Decker argues that the sheriff is not liable for the amount of the judgment until the sureties have *first* been prosecuted by the plaintiff in this suit, and their irresponsibility established by a failure to collect of them by execution the amount of his judgment; and that at all events, as the undertaking was originally given for the defendant's security, he has the right to *elect* to take his remedy against the sureties by action upon the undertaking.

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The proceedings in the present action of replevin bear a considerable analogy to these prescribed by the revised statutes. In those proceedings the remedy of the defendant, in case the sureties did not justify, was to obtain judgment of discontinuance against the plaintiff and for a return of the property and for his damages ; (2 R. S. 527, § 30 ;) and on such judgment being rendered, " the sheriff shall be liable to the defendant for the sufficiency of such sureties as now provided by law." (§ 33.) " And such sheriff shall be entitled to the same remedy on the bond taken by him [it was then taken directly to the sheriff, 2 R. S. 523, § 7] as in cases of bonds taken on the arrest of a defendant in personal actions." (§ 33.) It has been supposed that under the code the defendant cannot have a discontinuance of the action, because the plaintiff's proceedings to obtain possession of the property are not as they formerly were a part of the machinery of commencing the suit. (*Per Edwards, J. in Manley v. Patterson*, 3 Code Rep. 89.) And it would appear that by excepting to the plaintiff's sureties the defendant has precluded himself from requiring the *immediate* return thereof provided for in section 211 of the code. But I am not prepared so say that it is not within the equitable powers of this court to stay the plaintiff's proceedings until he shall furnish competent sureties, or even to order a discontinuance of the action in case such sureties were not furnished within a reasonable time. However that may be, it has been held under sections 211 and 212, which provide " that the sheriff shall be responsible for the defendant's sureties (given on a claim by him for the return of the property) until they justify," that the sheriff is liable in an action to the plaintiff in the suit, after the latter has recovered judgment in the replevin suit and an execution thereon has been returned unsatisfied. (*Gallarati v. Orser*, 4 Bos. 94.) And I am inclined to think that the provision in sections 210 and 212, that the sheriff shall be responsible for the sufficiency of the sureties, means that the sheriff is liable in an action where the sureties would

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be; that he stands in their place, and is to be regarded himself as the surety of the party plaintiff or defendant.

The important question, however, remains, Has the defendant in the replevin suit precluded himself from an action against the plaintiff's sureties because he has excepted to their sufficiency, and they have failed to justify? Certainly, I think they are not absolutely discharged from all responsibility, for they voluntarily became the plaintiff's sureties, and should not be permitted to release themselves from liability by a willful or negligent refusal to justify. They ought, I think, at all events, to be held for the protection of the sheriff, to the end that if he be made liable to the defendant, he may seek his indemnity against the sureties, who are not taken unless "approved by the sheriff." (*Sec. 209.*) And, I think the court would, if necessary, compel an assignment of the undertaking by the defendant to the sheriff. That would probably not be necessary in the case of an undertaking like the one in suit, for it has not, in terms, any obligee or promisee, and may therefore probably be enforced for the benefit of the party really interested therein. It may therefore be regarded as an undertaking to the sheriff or to the defendant. The defendant has, indeed, said I am not satisfied with it, or I do not believe the obligors are pecuniarily responsible; but there seems to be no express provision for his obtaining a better one, if the sureties are obstinate and refuse to justify. And he is therefore necessitated to rely exclusively upon the sheriff's responsibility, unless he is permitted to avail himself of this undertaking. An exception to the sufficiency of the sureties can scarcely be regarded as an absolute rejection of the undertaking; for the defendant has no power to make such absolute rejection. And I think he may *recall* his exception. May he not, after giving *notice* of the exception, countermand it before justification; for it is no injury to the adverse party or to the sureties to permit him to do so. And may not his proceeding in the suit after failure to justify, and

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especially his institution of this action, be regarded as an election to waive the exception to the sureties.

Again, under the former practice, where the bond on the institution of the proceedings was given directly to the sheriff, the defendant, on obtaining judgment of discontinuance for failure to justify, was entitled to an assignment of the bond given to the sheriff and to prosecute the same. Such is, at least, I think, the effect of the statutory provisions in regard to the old action of replevin, when read in connection with the statutory provisions for the assignment of the bond given by bail to the sheriff, in the event of bail to the action not being put in. (*See 2 R. S. 527, §§ 30, 33 ; 2 id. 349, §§ 11, 12.*) If so, it would seem that the defendant, notwithstanding his exception to the sureties, would be entitled at his request, to an assignment from the sheriff of the undertaking, if it were taken in the name of the latter.

I have already stated that the tenor of the undertaking is such as probably not to require a formal written assignment by the sheriff to the defendant. If an assignment should be regarded as necessary, I am inclined to think an assignment by manual delivery would be sufficient ; and we may conclude that such was made, because we find the undertaking in the possession of the plaintiff in this action, and for aught that appears in the case, with the assent and sanction of the sheriff.

I am, therefore, inclined to think the action was well brought, and that the plaintiff was entitled to judgment, and therefore that a new trial ought to be granted ; and such must be the order unless the adjudications of the courts bring us to a different result. There are no decisions directly upon this section of the code. The case of *special bail* appears to have some analogy to the case of sureties to an undertaking in replevin under the code. But it is said that although it is clear that special bail, when excepted to, and they failed to justify, were no longer bail, yet that such defense was only available by way of motion to have an exon-

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eretur entered upon the bail piece, and was not a defense to an action against the bail. And all the cases to which we have been referred as announcing such a doctrine were motions for an exoneretur, and at least, not actions against the bail. *Waterman v. Allen*, (1 Cowen, 60,) was simply a motion to set aside a default, in which the principle only was recognized. *Thorp v. Faulkner*, (2 Cowen 516,) was a motion for an exoneretur, as was also *The People v. Judges of Onondaga Common Pleas*, (1 Cowen, 54.) *Lawrence v. Graham*, (9 Wend. 478,) was a motion by a party who had been surrendered by his bail, to be discharged from imprisonment upon the ground that the bail having been excepted to, and having failed to justify, were discharged from further liability, and hence had no right to surrender their principal, and the motion was granted. *Gallarati v. Orser*, (4 Bosw. 94,) was a case involving the liability of the sheriff, and not of the sureties, in case they failed on exception to justify, and was also under a different section of the statute from that which we are now considering.

But the case of *Duynee v. Coope*, (1 Hill, 557,) ought perhaps to be regarded as conclusive in this court. It was not brought to my notice at special term, and although the case is not valuable as a discussion of the question upon principle, it ought, perhaps, to be regarded as authority. It was a suit against the sureties, on a replevin bond, given under the revised statutes, to the coroner, as the defendant in the replevin suit was the sheriff. The defendant having succeeded in the replevin suit, and failing to satisfy his judgment on execution, took an assignment of the replevin bond and commenced this action. The defense set up was the same as in this, to wit: that the defendant in the replevin suit excepted to the sureties in replevin and that they failed to justify. But the defense, although sustained at the circuit, was overruled at bar; and the court say: "The doctrine that an exception against special bail, and their omission to justify, displace them as bail, has no application." They

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further say that it was good as to special bail only on a motion for an exoneretur, and could not be used as a defense by plea to an action upon the recognizance. They intimate a doubt whether the complete substitution of new bail would work on exception taken, a discharge of the old; and that nothing short of a strict compliance with the condition, unless prevented by the act of the obligee, would avail as an effectual defense. So direct an authority, does not, I think, leave us at liberty to consider the question an open one; and upon the strength of it, *a new trial must be granted, with costs to abide the event.*

GOULD, J. concurred.

New trial granted.

[ALBANY GENERAL TERM, December 1, 1862. *Gould, Hogeboom and Peckham, Justices.*]

In the matter of the application of JOHN V. L. PRUYN *vs.*
ADAM VAN ALLEN, receiver of the Bank of Albany.

Where, after the making of an assessment against the stockholders of a bank, in pursuance of the act of April 5, 1849, to enforce the responsibility of stockholders &c. for the unsatisfied debts of the bank, there remains a sum in the hands of the receiver, the proceeds of certain assets of the bank, beyond what was anticipated or known at the time of the assessment, the same will not be ordered to be distributed among the stockholders, so long as there are creditors of the bank who are not yet fully paid, and such assets are necessary for that purpose.

It was not the intention of the act, or of the constitution, that stockholders should be reimbursed any portion of their contributions, until the debts of the corporation were extinguished; but on the contrary it was designed to make the stockholders liable to the creditors, to the full extent of their stock, until the debts are completely satisfied.

THE receiver, under the act of 1849, ch. 226, (*Sess. Laws*, p. 340,) and within the time (180 days, as enlarged by the judge,) named in section twelve, converted all the assets

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which he could into money, by collection and by a sale of all such assets as the judge (to whom an application for leave to sell all the assets was made) authorized to be sold. The judge expressly refused authority to sell some of the assets, and some of that class have been collected before and some since the report, and assessment made by the receiver, and against the stockholders, as hereinafter stated, and the avails of such assets received since such report, and the remaining uncollected assets (amongst which are bonds and mortgages not yet due, and held as collateral to debts still unpaid) are now in the hands of the receiver, who desires to dispose of the money on hand and, when proper, of the unconverted assets. The receiver declared a dividend as required by section twelve, and in pursuance of sections fourteen and fifteen made his report of the unsatisfied debts &c., and a reference was ordered and the referee appointed, and the assessment was made against the stockholders, in pursuance of the statute, for the unsatisfied debts, about \$325,000.

On the motion for confirmation of the assessment, application was made by Mr. Pruyn that the order should contain a direction that the assets then on hand should, when converted into cash, be distributed amongst the assessed stockholders, instead of being applied to pay the debts of the bank, which were then likely to, and do now ascertainedly, remain unsatisfied, by reason of the insolvency and pecuniary irresponsibility of some of the stockholders who were assessed. Such deficiency from insolvency &c. amounts, as estimated, to say \$70,000, which will probably for the greater part never be collected. The assets still unsold, and the money received from assets (other than such assessments) since the assessment or report, and now on hand, are estimated to yield, if all collected, \$40,000 or over.

The order for confirmation did not contain the provision asked for, but was made without prejudice to a renewal of the application for such a provision. That application is now made.

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J. V. L. Pruyn, for the appellant.

C. M. Jenkins, for the receiver.

HOGEBOM, J. In this case the petitioner applies in behalf of himself and other stockholders of the Bank of Albany, for distribution among them of the proceeds of certain assets of the bank. The receiver resists the application upon the ground that the creditors of the bank are not fully paid, and that these assets are necessary for such purpose. The fact being in accordance with the claim of the receiver it would seem but just, as well as lawful, that the creditors should be entitled to a preference. Section two of article eight of the constitution declares that "dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law." Section seven of article eight makes the stockholders, in every banking corporation and association doing business after the 1st of January, 1850, individually responsible to the amount of their stock, "for all its debts and liabilities of every kind" contracted after the last mentioned date. (1 *R. S. 5th ed.* 68, 69.) It is not pretended that the stockholders as yet have been assessed to the amount of their stock. These constitutional provisions manifest a decided intention to protect, at all events, the creditors of the bank, as against the bank, to the extent of its ability to pay, and as against the stockholders in addition to the extent of their stock. And anterior to the act of 1849, creditors of the bank were allowed to sue stockholders individually, and collect of them so much of their debts as would not exceed the amount of stock held by the stockholders respectively thus sued. But as it was perceived that this might lead to an unnecessary multiplication of suits, and to excessive and perhaps oppressive litigation, the matter was sought to be in some degree regulated and restrained by the act of 1849. (*Laws of 1849, ch. 226, p. 340. 2 R. S. 5th ed. 581.*) It

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is under the provisions and limitations of this act that the applicants suppose themselves entitled to the fund in question, and the claim is that the act contemplates the conversion of the available assets of the bank into money, within 90 or at most 180 days, and that after that period, (the deficiency of assets to pay the creditors being thus accurately ascertained,) the receiver must apply for and by the order of the court obtain permission to make the single and only assessment upon the stockholders on account of their stock which the law authorizes, to wit, an assessment of an amount which equally and ratably distributed among the stockholders, would exactly equal and satisfy the amount of unpaid debts, or so much of it as would not exceed the aggregate amount of the stock. This course pointed out by the statute has been pursued; but in the practical operation of it two results have followed: 1. By reason of the insolvency or other disability of some of the stockholders to pay, the full amount of the assessment has not by several thousand dollars been realized. 2. By reason of the assessment having been made before it was conclusively determined what was the full amount which could be realized from the assets of the bank, a fund of some \$10,000 (less than the deficiency in the assessments) has been collected from the assets, beyond what was anticipated or known at the time of the assessment.

It is this fund which the appellants claim, they having, by the assessment, been made to pay, as they insist, their full *ratable* proportion of the unpaid indebtedness, and not being liable to make up the deficiency arising from the insolvency or inability to pay of their fellow corporators or associates. But I think they are not entitled to this fund. Assuming that under the act of 1849 but one assessment can be made, (which, if it be so, ought to be corrected by further legislation,) that assessment may, I think, legally, and should be sufficiently large to cover in its actual product the entire unpaid indebtedness of the bank. It is true the act

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carefully provides for the payment over to the creditors, of the available assets of the bank, and for an apportionment of the unsatisfied debts and liabilities of the corporation among the stockholders, ratably in proportion to their stock, (§ 16, 2 *R. S.* 5th ed. 586, § 291;) but I do not perceive any restriction upon the power of the court to make the assessment sufficiently large, provided it be ratable, to cover in its anticipated pecuniary results, beyond all reasonable contingency, the entire deficit of indebtedness. This is in accordance with the spirit of the act and of the constitution, which obviously intend that the creditors shall be fully paid, so far as the assets of the corporation and an additional amount, equivalent to the nominal amount of the stock, will enable it to be done. And it was never designed that the stockholders should be reimbursed any portion of their contributions to such a fund, until such debts were extinguished. The necessary expenses of the receiver, referee, clerks, and other incidental expenses attending the execution of their duties under the act, are declared expressly to be a charge upon the fund obtained by assessments, before dividends thereof shall be made, (§ 22;) and yet, although these would necessarily diminish the fund, it is not *expressly* declared that any allowance should be made for them in making the apportionment. But it is so obviously just, and within the intention of the legislature, that they should be, that I cannot doubt the power of the court to make the apportionment sufficiently large, (of course within the maximum limit of such apportionment,) to cover them. So the 21st section provides that the moneys collected by the apportionment shall be divided among the creditors. But who can doubt that if it should so happen that in the intervening time these debts were otherwise wholly or partially satisfied, or proved to be unfounded, the directions of the statute need not be literally obeyed, in such an unforeseen contingency, but that the stockholders would be entitled to such surplus. So, by section 23, neither the dividends nor the apportionment are

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to be delayed by reason of a pending litigation or controversy, by or against the corporation or association, but a sufficient sum may be retained in the hands of the receiver to protect him against any unfavorable result, and when the litigation or controversy shall have been closed, and the sum realized or lost by the event of the litigation, it is to be applied accordingly, or distributed among the creditors or stockholders, as the event may require. And the 24th section provides that after a certain event if any assets or effects remain in or come into the hands of the receiver, they shall, after being converted into cash, be distributed among the stockholders, in proportion to the sums paid by them. That event is *the payment and discharge of the debts and liabilities of the corporation or association*. And I think it is *only* after such an event that the stockholders can or ought to be entitled to any portion of the moneys coming into the hands of the receiver. The fund now in question was a part of the assets of the bank. The bank was unable to pay all its debts, and these assets, upon every principle of law and equity, should be devoted to that purpose. These assets are not the product of the assessment upon the stockholders, but were the property of the corporation itself. To deprive the creditors of the corporation of this fund, by an over nice criticism and merely literal construction of the terms of the act, would be doing violence, I think, both to the spirit of the law and of the constitution.

It is said that such a construction will make the stockholders sureties for each other; that is, the responsible stockholders sureties for the irresponsible ones. This is not so, but it makes, as I think the law and the constitution intended, the stockholders liable to the creditors to the full extent of their stock until the debts are completely satisfied. The doctrine of suretiship is not applicable; but if it be claimed that such is the practical effect of the construction adopted, then I regard it as far more just, as well as legal, that the co-corporator or associate should be the surety for the delin-

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quent stockholder, than that the creditors should. The stockholder is supposed to be more familiar with the operations of the bank, and with the credit and standing of his fellow stockholders; and if he is dissatisfied therewith he can sell his stock. He is a member of the corporation, enjoys its benefits, is entitled to its privileges, receives its dividends, controls its direction, and, to a certain extent, guaranties its solvency. The creditor deals with the corporation as with an independent and, to a certain extent, antagonistic contracting party; pays for the benefits he receives and the privileges he enjoys; trusts, with reason, to the ability of his debtor to pay, and confides in the provisions of the constitution and or the law intended for his protection and indemnity.

The application must be denied, and the receiver be directed to distribute the fund among the creditors of the bank.

[ALBANY SPECIAL TERM, January 27, 1868. *Hogeboom*, Justice.]

BEACH vs. COOKE, administratrix &c.

A complaint was filed against a mortgagee, by the plaintiff, in two capacities: 1. As the owner of the mortgaged premises, to obtain a decree declaring the mortgage satisfied, and removing the apparent incumbrance from the land; or, if the mortgage was not entirely paid, to apply upon the same so much of certain claims against the mortgagee of which he was assignee as would suffice to extinguish the same; 2. As assignee of those claims, to obtain a judgment against the defendant for the amount thereof, or so much of such amount as should remain after satisfying the mortgage. There was also a prayer for general relief, but no specific prayer for leave to *redeem* the mortgage. *Held* that as the facts embraced in the pleadings and proved on the trial presented a fit case for that relief, and as the claim for such relief was made at the close of the case, and was susceptible of being granted, under the allegations and proofs and the prayer for general relief, the decree should have provided for it, by declaring the amount due upon the mortgage, and that upon payment thereof by the plaintiff the mortgage should be canceled.

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THIS action was commenced in 1853, to obtain the decree or judgment of this court, among other things, that a mortgage given by Ephraim Beach, on the 4th day of January, 1836, to one Francis J. Marvin, to secure originally \$52,000 upon lands in the town of Catskill, in the county of Greene, was fully paid, and should be discharged of record. The complaint alleges that prior to the 4th of January, 1836, the original defendant, Thomas B. Cooke, and Ephraim Beach, Amos Cornwell, John S. Platt, Newton Hayes, Peter T. Mesick, and others, were about to form a "land association," for the purpose of purchasing lands near the village of Catskill, along the line of the Catskill and Canajoharie rail road, the capital of the said association not to exceed \$200,000. That subsequently and during the year 1836 the association was formed. That by arrangement between the associates, lands were purchased for the association and conveyances taken in the name of any member who chose to take the same, and that a large amount of real estate was so purchased. That on the 4th of January, 1836, the original defendants, Thomas B. Cooke, Ephraim Beach, and others, members of the said association, purchased a large amount of real estate, near Catskill, for said association. That by agreement the conveyance of the lands purchased of Marvin was made to Ephraim Beach, and that in payment for said lands, (and \$2000 of bridge stock,) a bond was given to Marvin in the penal sum of \$100,000, conditioned to pay \$52,000 and interest, signed by T. B. Cooke, E. Beach, Platt, Hayes, Cornwell and Mesick, and Beach gave his mortgage on the premises so purchased. It is also alleged in the complaint that prior to the 20th of September, 1839, the mortgage was fully paid by the associates, and that about that day Thomas B. Cooke procured the said bond and mortgage to be assigned to him by the holder thereof, and now claims to hold the same as a demand against Beach, and as a lien on the lands embraced in the mortgage. It is then further alleged that on the 13th of July, 1853, and before

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the commencement of this suit, Ephraim Beach, the mortgagor, conveyed to the plaintiff in this action all the lands described in the said mortgage. It is also alleged that Cooke and E. Beach had large private transactions with each other, and that Cooke on account thereof was largely indebted to E. Beach, and that E. Beach not only conveyed the mortgaged premises to the plaintiff, but also assigned him the said claims and demands, which it is claimed should be applied in payment of the said mortgage, so far as necessary for that purpose. It is also alleged that before the conveyance of the lands to the plaintiff, and after Cooke obtained said mortgage, Ephraim Beach paid the said mortgage to Cooke. It is then demanded that the mortgage should be declared paid and canceled of record, and that there should be an accounting of all dealings between defendant and E. Beach; that so much of the plaintiff's demands as was necessary for that purpose should be applied to the payment or reduction of said bond and mortgage, and the defendant Cooke be adjudged to pay the plaintiff any balance due, with costs, and for general relief. The answer denies the whole complaint, and further alleges that Cooke signed the bond to Marvin as surety for E. Beach, and that on the 20th of September, 1839, Cooke paid for Beach \$10,000 on the bond and mortgage to Marvin, and that for that amount Marvin assigned the bond and mortgage to Cooke, and that at the time Beach admitted that Cooke had signed the bond as surety, he requested Cooke to advance the \$10,000 to Marvin, and consented that Marvin should assign the bond and mortgage to Cooke as security. The answer then alleges that Beach was largely indebted to Cooke, and also sets up the statute of limitations. Thomas B. Cooke having died, the action was revived against Maria R. Cooke, his administratrix. The cause was referred to John C. Newkirk, Esq., referee, and tried before him, and he found the following facts: *First.* The purchase by Beach of Marvin on the 4th of January, 1836, of the real estate in question (and bridge stock) and

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the conveyance of the same to Beach by deed bearing date on that day. *Second.* That to secure the payment of the purchase money, Beach, with T. B. Cooke and others, gave Marvin their bond in the penal sum of \$100,000, conditioned to pay \$52,000 and interest, in installments. *Third.* That further to secure the payment, Beach gave his mortgage on the premises, which is sought to be canceled. *Fourth.* That the bond given as aforesaid was signed by Cooke, Platt, Hayes, Cornwall and Mesick, as the sureties of Beach. *Fifth.* That from the time of the execution of the mortgage until the hearing of the cause before the referee, E. Beach resided on a portion of the mortgaged premises, and was during the whole of the time in the receipt of the rents and profits of the whole. *Sixth.* That on the 15th of June, 1853, E. Beach conveyed the whole of the real estate described in the mortgage by warranty deed to the plaintiff in this action. *Seventh.* That the bond and mortgage were reduced by payments made at different times, so that on the 20th of September, 1839, there was due thereon \$24,625.92. *Eighth.* On that day Ephraim Beach paid the balance due on said mortgage by cash and securities, except \$10,000. The securities turned out by him amounted to \$10,000, and among them was a mortgage on real estate in Newark, N. J. given by Nathan Bowles for \$5000, and one for \$2000, and that on that day Thomas B. Cooke, at the request of Beach, advanced and paid for Beach on said mortgage to Marvin, \$10,000, the residue of the amount due on the mortgage, and Cooke took as security for such advance an assignment of the bond and mortgage for \$10,000 from Marvin. *Ninth.* That the assignment by Marvin to Cooke was given with the knowledge and consent of Beach. *Tenth.* That the two mortgages given by Bowles, mentioned in the assignment, were paid before this suit was commenced. *Eleventh.* That on the 8th day of January, 1840, Beach delivered to Cooke seven certificates of Canajoharie and Catskill rail road state stock for \$1000 each, with a power of attorney to transfer the

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same, and on the 25th of April, 1840, also delivered three other certificates for \$1000 each, with a like power of attorney to transfer the same. That these certificates were delivered to Cooke, under an arrangement that the proceeds when sold were to be applied as a payment on the \$10,000 paid by Cooke to Marvin, and as security for which he held the assignment of said bond and mortgage. *Twelfth.* That Cooke sold these stocks on the 5th of June, 1843, and realized from the same over the expenses of sale, \$11,337.50. *Thirteenth.* That no payments other than the proceeds of said stock have been made on the \$10,000 advanced by Cooke. *Fourteenth.* That on the 5th of June, 1843, there was due to Cooke on the \$10,000 advanced, \$12,597.34, and deducting therefrom the proceeds of the stock, \$11,337.50, there remained a balance in favor of Cooke of \$1259.84, which with interest from June 5th, 1843, is still due and unpaid. *Fifteenth.* That Cooke, Beach, Platt, Cornwell and others, by articles of association on the 27th of June, 1836, formed a land association for the purchase and sale of real estate, adjacent to the village of Catskill. That it was the intention of the parties that the real estate purchased by Beach of Marvin and covered by the mortgage should be taken by the association and form a part of their lands, but the same were never conveyed to or belonged to said association, and the title to the same remained in Ephraim Beach until he conveyed the same to the plaintiff, and he (E. Beach) always was in the occupation of the same, and received all the rents and profits thereof. *Sixteenth.* That after the formation of the said land association there were various dealings and money transactions between Beach and the association, which are unsettled. *Seventeenth.* That from 1836 to 1843, there were divers business and money transactions between Beach and Cooke to a large amount, which on the 13th of July, 1853, and at the time of the commencement of this action, were and still are unsettled. *Eighteenth.* That on the 13th of July, 1853, E. Beach sold

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and assigned to the plaintiff all his interest in and to the property of the land association, and all demands against the same or any member thereof, and also all accounts, claims and demands of every name and nature against Thomas B. Cooke. *Nineteenth.* The referee further states that he has not taken or stated the accounts between the said E. Beach and T. B. Cooke, or between Beach and the land association, *such purpose of this action being abandoned by the plaintiff.* That the investigation in regard to the said accounts was confined to the point of ascertaining what payments had been made on said bond and mortgage and moneys properly applicable thereto. The referee found the following conclusions of law: *First.* That Cooke by virtue of the assignment by Marvin on the 20th of September, 1839, held the bond and mortgage as a valid security against E. Beach and upon the mortgaged premises for \$10,000 and interest. *Second.* That the same was not fully paid, and \$1,259.84 with interest from June 5th, 1843, is still due thereon. *Third.* That the representative of Thomas B. Cooke, deceased, is entitled to hold the same as a security for the payment of the balance due thereon. *Fourth.* That the complaint be dismissed with costs. Before the final submission of the cause to the referee, and on the argument before him, the plaintiff's counsel claimed that the referee should make a decree declaring the mortgage paid and satisfied, and ordering the execution of a satisfaction thereof; or, if not wholly paid, then that the amount remaining due should be declared and satisfaction ordered on payment thereof.

The plaintiff excepted to all the conclusions of law found by the referee, and to the finding that the mortgage was not fully paid, and because the plaintiff was awarded no relief; and judgment having been entered upon the report of the referee, the plaintiff appealed therefrom to the general term of this court.

On the trial of the cause before the referee, various questions were made as to the inadmissibility of evidence, which,

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so far as material to the disposition of the case, are considered in the opinion of the court.

L. Tremain for the plaintiff, (appellant.)

J. H. Reynolds for the defendant, (respondent.)

By the Court, HOGEBOM, J. The plaintiff in this action was the grantee of certain lands formerly owned by Ephraim Beach, upon which the original defendant, Thomas B. Cooke, claimed to hold a valid mortgage. He was also the assignee of Ephraim Beach, of certain demands and choses in action, claimed to be held by Ephraim Beach against said Cooke ; and he instituted this suit in both capacities : 1. As the owner of the real estate, to obtain a decree declaring the mortgage satisfied, and removing the apparent incumbrance from his land ; or, if said mortgage was not entirely paid, to apply upon the same so much of the claims of which he was assignee as would be sufficient to extinguish the same. 2. As assignee of the aforesaid demands, to obtain judgment against Cooke for the amount thereof, or so much of such amount as remained after satisfying the mortgage. There was also a prayer for general relief. This is substantially the relief sought by the complaint ; and as a part of it, or incidental to it, the complaint prayed that (if the mortgage was found not to be wholly paid) the balance due upon the same be ascertained and determined by the judgment of the court, with a view to its application upon the demands assigned to the plaintiff ; and, also, that an accounting might be had of all dealings and transactions between Ephraim Beach and Thomas B. Cooke, to the end that the balance might be ascertained, and the defendant ordered to pay the same to the plaintiff. The plaintiff does not seem to have anticipated the contingency that there might still be found a balance due upon the mortgage, after all payments and counter-claims had been credited thereon ; and therefore, the

complaint does not contain any specific prayer for permission to redeem the mortgage, which, nevertheless, would have been a perfectly proper prayer to have incorporated into the complaint, and consistent I think with the case made therein. And the question in this case is, whether without such relief being specifically sought, or apparently contemplated when the action was commenced, the plaintiff was nevertheless entitled to it at the close of the case, and had a right to demand it from the tribunal which disposed of the action; for I think it was in substance demanded before the questions in controversy were finally submitted to the referee. The case shows that on the argument before the referee, the plaintiff distinctly claimed a decree, 1. Declaring the mortgage paid and satisfied, or 2, If not so, ascertaining the amount remaining due, and decreeing satisfaction on payment thereof. It might well be, that in the absence of a specific prayer for leave to redeem, and in the absence of any thing occurring in the proceedings before the referee to induce him to suppose that the plaintiff sought the privilege of redemption, he might reasonably conclude that the plaintiff did not desire it, and so omit any provision for it in his judgment. But as the facts embraced in the pleadings, and proved on the trial, presented a fit case for such relief if desired; and as the claim for such relief was distinctly made at the close of the case, and was susceptible of being granted under the allegations in the pleadings and the proofs connected therewith, and under the clause for general relief, (*Ward v. Dewey*, 16 *N. Y. Rep.* 519; *Eno v. Woodworth*, 4 *Comst.* 253; *Marquat v. Marquat*, 2 *Kernan*, 336; *Emory v. Pease*, 20 *N. Y. Rep.* 62,) I am of opinion that the decree should have provided for it to the extent claimed; that is, that it should have declared (as did the referee's report) the amount remaining due upon the mortgage, and that upon payment thereof by the plaintiff, the mortgage should be canceled. The plaintiff, I understand, is satisfied to accept of such a decree, fixing the time of payment within a rea-

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sonable time, (usually six months,) in analogy to the practice in cases of redemption. (2 *Barb. Ch. Pr.* 199, 630. *Quin v. Brittain*, *Hoff. Ch. R.* 353. *Waller v. Harris*, 7 *Paige*, 167. *Boquet v. Coburn*, 27 *Barb.* 230. *Bell v. Mayor, &c.* 10 *Paige*, 49.) And the defendant will not, of course, object to such a limitation of time. In thus modifying the judgment of the referee, I do not see that any injustice is done to the defendant, who has had a full opportunity to litigate with the plaintiff the amount remaining due on this mortgage. And after such means of litigation the amount thus ascertained to be due should be put in a shape (as it will be by such a modification of the decree) which will render it conclusive between the parties. It is suggested, indeed, on the part of the defendant, that by the decision of the referee the plaintiff's grantor and assignor has been permitted to testify to facts as to which he was incompetent to give evidence. But I do not think this suggestion should have any effect upon our decision. If the action of the referee was not satisfactory to the defendant, and by the evidence of Ephraim Beach the amount due upon the mortgage has been unjustly diminished, the practical remedy was to review his decision by an appeal on the part of the defendant, who was bound to anticipate the possible modification of the decree by a court of review on the appeal of the other party. It is also suggested that the evidence in the case justifies the conclusion that the plaintiff was not a bona fide purchaser of the land in question, and that upon that ground an absolute and unconditional decree dismissing the plaintiff's complaint was proper. The answer to this is, that the referee evidently decided that fact adversely to the defendant; for, in the first place, he refused to nonsuit on that ground; and in the second place, he reported that the plaintiff was the grantee of the land, and the assignee of the choses in action, which being unqualified must be construed to mean the bona fide assignee and grantee. And there is evidence to sustain his finding.

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This is as far as it is necessary to go, in the disposition of this case. It is unnecessary to inquire whether the action was maintainable as being essentially a bill *quia timet*. And it is unnecessary to decide whether the state of the accounts between the parties would have justified a decree more favorable to the plaintiff. I am of opinion that, taking the case as presented to us, we must assume that the stating of the account between Ephraim Beach and Thomas B. Cooke (farther than ascertaining the amount due on the mortgage,) was waived or abandoned by the plaintiff. For, 1. The referee held that Ephraim Beach was an incompetent witness on that subject. 2. The plaintiff objected to evidence offered by the defendant bearing on that subject, "that the state of the accounts between Beach and Cooke is not involved in the cause as it now stands." 3. The referee expressly reports that such purpose of the action was abandoned by the plaintiff. This, as a fact stated by the referee as occurring in the proceedings in the cause, must, like any other fact of a like nature, as the fact of an examination of a witness, or the fact of an objection to testimony, be taken to be true. The remedy for it, if it be an error, is not by appeal, but by a resettlement of the case, and a correction of the error.

I am of opinion that the judgment appealed from should be so modified as to declare and adjudge that the sum of \$1259,84, with interest from the 5th day of June, 1843, remains due and unpaid to the plaintiff upon the mortgage mentioned in the pleadings, and that upon payment thereof, together with the costs of the action as ordered by the referee, within six months after written notice of the entry of this decree, (unless in the meantime an action for the foreclosure thereof shall have been commenced or shall be in progress,) and then upon the payment of the costs of the suit in addition, unless the court in that action shall otherwise order, the plaintiff shall be permitted to redeem and pay the said mortgage; and the defendant shall, upon re-

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ceiving such payment execute, acknowledge and deliver a satisfaction thereof; and that neither party shall have costs, as against the other, on this appeal.

[ALBANY GENERAL TERM, March 2, 1863. *Gould, Hogeboom and Miller, Justices.*]

L. & L. H. SMITH *vs.* BROWNELL.

The defendant, being the owner of a judgment against H., rendered by a justice of the peace, upon which an execution had been issued and levied on sufficient property, sold the same to the plaintiffs, who gave their promissory notes for the amount, which were received in full satisfaction for the judgment; the defendant agreeing to assign the judgment to the plaintiffs the next morning. Instead of doing so, however, he receipted the execution in full, and the justice thereupon discharged the judgment. H. then gave a chattel mortgage upon the property levied on, to other persons. The defendant kept the notes, and refused to assign the judgment. *Held* that the evidence showed a good cause of action in favor of the plaintiff, for the breach of the defendant's agreement, and that it should have been submitted to the jury.

A PPEAL from a judgment of nonsuit ordered at the circuit.

W. B. Ruggles, for the appellants.

J. F. Wetmore, for the respondent.

By the Court, WELLES, J. On or about the 1st day of August, 1861, the defendant had a judgment in his own name, against one Hadley, rendered by a justice of the peace on the 18th day of April, 1859, for \$92.65, upon which an execution had been issued on the 23d day of July, 1861, and delivered to a constable, who by virtue thereof had, on the same day, levied upon personal property of Hadley sufficient to satisfy it, and had advertised the same for sale.

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After this, and on the day before that mentioned in the advertisement for the sale of the property, and on or about the said 1st day of August, 1861, a negotiation took place between the plaintiffs and the defendant, which the plaintiffs contend, and so the evidence tends to prove, resulted in an agreement between them in the evening of the day last mentioned, by which the plaintiffs purchased of the defendant the judgment against Hadley, and executed and delivered their four promissory notes therefor to the defendant; three for \$28 each, payable in one, two and three years, and the other for \$27, payable in four years, all bearing interest from date. These notes were received by the defendant in full satisfaction for the judgment, and he agreed to deliver to the plaintiffs an assignment of the judgment the next morning, saying he could not conveniently do it that evening, as the papers were locked up in his office. That by the arrangement the plaintiffs were to be put in the defendant's place in respect to the judgment and execution. The transaction, so far, was consummated about nine o'clock in the evening; the defendant agreeing to assign the judgment to the plaintiffs the next morning, and promising to see the constable before the hour of sale, and have the sale postponed in case one of the plaintiffs should not be there in time. The next day the defendant, instead of assigning the judgment to the plaintiffs, gave a receipt in full for the same, without the consent and against the will of the plaintiffs, and the execution was returned by the constable satisfied in full, by the plaintiff's (the defendant in this action,) receipt in full indorsed thereon. Entries were made by the justice to that effect in his docket. After this, Hadley gave chattel mortgages upon the same property to other persons, for more than its value. The plaintiffs, in the afternoon of the day after the notes were executed and delivered as above, demanded of the defendant the assignment of the judgment or the delivery up of the notes. He did not assign the judgment or deliver up the notes. Some time after the defendant told

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one of the plaintiffs to hold on and they would arrange it. A few days after, the defendant met one of the plaintiffs and said he had concluded to keep the notes and collect them when due. He has never assigned the judgment.

Evidence was given by the defendant in some respects variant from the foregoing, but which is not necessary to be stated, as the plaintiffs were nonsuited, and if the case as made out by the plaintiffs' evidence entitled him to a verdict, it should have been submitted to the jury to say which version was the true one.

It seems to me the plaintiffs' evidence established a good cause of action and should have been submitted to the jury. The purchase of the judgment was complete without a formal assignment. All that remained to complete the arrangement was for the defendant to put the plaintiffs in possession of their title, to enable them to control the judgment with more facility. They had paid for it by their notes which the defendant had received in full for the consideration of the purchase money of the sale. By the agreement between the parties the judgment was to be assigned to the plaintiffs, so that they would hold it in full operation with all its incidents. They were to be put in the defendant's place in respect to the judgment and execution. The defendant grossly violated his agreement, not only by refusing to assign the judgment but more especially by indorsing the execution satisfied; thus doing all in his power to destroy and render it worthless to the plaintiffs. He is not at liberty now to allege that his acts were unauthorized, or that the judgment is still valid and subsisting. His receipt was a justification to the constable in returning the execution satisfied, and to the justice in entering the satisfaction on his docket. It is doubtful whether an action could be maintained upon the judgment after a sufficient levy had been made under the execution, and the levy relinquished, and the judgment apparently satisfied on the justice's docket. The plaintiffs were entitled, by the agreement, to all the

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rights of the defendant to the judgment, execution and levy. These rights, if not destroyed, have been jeopardized and rendered nearly or quite valueless by the conduct of the defendant. The levy was as important to the plaintiff as any part of his purchase, and that was lost by the act and refusal of the defendant.

The defendant will not be permitted to allege that he cannot compel payment of the notes. He has taken them as payment for the assignment of the judgment, and refuses to restore them to the plaintiffs, who should not be left exposed to the risk, vexation and expense of defending against them. They were payable at a future day, and would unquestionably be valid in the hands of an innocent *bona fide* indorsee or holder for value. I think the judgment should be reversed and a new trial ordered, with costs to abide the event.

Ordered accordingly.

[MONROE GENERAL TERM, March 2, 1863. *Johnson, J. C. Smith and Welles*, Justices.]

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JANE GAMBLE, *appellant*, vs. ROBERT GAMBLE, and others,
executors &c., *respondents*.

A testator, being in the same room, with W. and K., took up his will, which was not yet signed, and turning to W. and K. and calling each of them by name, said: "That is my last will and testament." He then took a pen and wrote his name to it. W. then took the paper from the table and subscribed his name to it, and handed it to K. who signed his name to it. *Held* that the directions of the statute were complied with, notwithstanding the declaration was made *before* the testator had signed the will, instead of afterwards.

The attendance of W. had been procured by the testator for the purpose as well to be a witness to his will as to write it, and the attendance of K. had been procured for the sole purpose of his becoming a subscribing witness. They were in the same room with the testator, and sitting at the same table, at the time he subscribed the will. After he had signed it he

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handed it to W., who subscribed it as a witness, in his presence, and handed it to K. who also signed the attestation clause; the testator telling the latter he must name the town and county he lived in. *Held* that there was a sufficient request to the witness; the testator's desire that they should subscribe the will as witnesses being unmistakably manifested, at the time, by his acts and declarations.

The apparent injustice of a testator to members of his family, although evidence to be taken into consideration in examining the question of the testator's soundness of mind, at the time of executing a will, is only a circumstance; and it seems, has never been regarded as sufficient, alone, to invalidate the will.

THIS was an appeal from an order of the county judge of Livingston county, acting as surrogate, admitting the will of David Gamble to probate. The will was executed in June, 1859, and the testator died September, 11, 1860. The will contained the following attestation clause, signed by the two subscribing witnesses: "The above instrument, consisting of one sheet, was now here subscribed by David Gamble, the testator, in the presence of each of us, and was at the same time declared by him to be his last will and testament, and we at his request sign our names thereto as witnesses." The appellant was the widow of the testator.

Scott Lord, for the appellant. I. There was no evidence, before the surrogate, that the witnesses to the will were requested to sign their names as such, in pursuance of the statute. If any such request was made, it was made several days before the will was written. The statute requires that the will shall be signed by the witnesses, at the request of the testator. (3 R. S. 5th ed. 144, § 35.) It appears affirmatively, from the evidence, that no request was made at the execution of the will, or after it was ready for execution, that any person should witness the same.

II. It appears affirmatively that the witness, Woodruff, was never requested by the testator to subscribe his name to the will, as a witness. The undisputed evidence upon this point is that the testator directed his son Robert to get Mr. Woodruff to draw the will, and to get Kelley as a witness.

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Robert asked him "if Mr. Kelley was all the witness he wanted?" The testator replied, "no; but Mr. Woodruff can be one." (1.) From all this it may be inferred that the testator had Woodruff in his mind as a possible witness, and perhaps that he then intended to request him, when he came, to be a witness to his will. But this intention does not answer the requirement of the statute—that the witness shall sign his name at the end of the will, at the request of the testator. (2.) No authority was conferred upon Robert to request Woodruff to be a witness. (3.) It is very doubtful from the evidence, whether the witness said any thing to Woodruff about being a witness. He was not requested to do so. His statement that he told Woodruff that his father wanted him to write his will, and "also as witness" was not a very natural one. (4.) But however this may be, nothing can be clearer than that the unauthorized statement to Woodruff that he was wanted as a witness, is not a compliance with the statute; unless it be the proposition that the agent could not communicate such request upon the supposed intention of the testator; and that no authority to the agent to request Woodruff to sign as a witness was conferred, because he was directed to request him to draw the will. (5.) Nothing can be inferred from the attestation clause; for the reason that it appears affirmatively that it was not read to the witnesses, nor in the presence of the testator.

III. The proof before the surrogate established the fact that the testator declared the instrument to be his last will and testament *before* he had subscribed the same, or in any manner executed it; and that he made no such declaration after the will had been "so subscribed." This fact appears from the testimony of Kelley, the surviving witness, which is in no manner weakened by the legatee and executor, Robert Gamble. (1.) The statute is very clear and explicit, as to the mode of executing a will. 1st. It must be subscribed by the testator. 2d. Such subscription shall be made in the presence of, or acknowledged to, the witnesses. 3. The tes-

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tator shall declare the instrument *so subscribed* to be his last will and testament. 4th. Two witnesses shall sign, &c. (2.) The will, until it is so subscribed, is no more than a blank paper; and the clear intention of the statute is that the will shall be perfected before the required declaration. (3.) The words "so subscribed" would be meaningless unless this construction is put upon them. If the legislature had intended that the will might be subscribed during the interview, these words would have been left out; but being in, they make the intention of the statute clear beyond all question. But if doubtful, the statute should be so interpreted as to give them some effect. (*Smith on Stat.* § 527. *Ward v. Whitney*, 4 *Seld.* 446.) Effect must be given to every part, if reasonably practicable. (*Westcott v. Thompson*, 18 *N. Y. Rep.* 366. *Chitty on Cont.* 70.) (4.) The mere order of events is not always material unless directed by statute, or rendered necessary in the nature of things. Both the statute and this necessity are combined in this case. 1st. The statute is imperative; and 2d. A person can no more declare an unexecuted will to be his last will and testament than he can acknowledge a deed which does not bear his signature. (5.) If the order of events at any one interview may be disregarded, then after the testator had signed the will, important additions might be made; or the witnesses might sign their names before the execution or declaration. But the words "at the end of the will" are no more significant than the words "so subscribed." (*Heyer v. Burger*, 1 *Hoff. Ch. Rep.* 20.) (6.) As the statute makes a just provision for every man's estate, there is no necessity for a court to repeal any part of the statute for the purpose of sustaining a will. (*Lewis v. Lewis*, 1 *Kern.* 220, 226, 227.)

IV. The fact of insanity having been established, it devolved upon the executors to show that the will was executed during a lucid interval. (*Jackson v. Van Dusen*, 5 *John.* 141. *Mowry v. Silber*, 2 *Brad.* 133.)

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V. At least the proofs before the surrogate established the fact that the testator, many years before the execution of the will, labored under a disease that weakened both his body and mind; and while in that situation was unduly influenced by his sons, John and Robert, the residuary legatees and devisees. The evidence shows that the will was not read to the testator. (*Van Pelt v. Van Pelt*, 30 Barb. 134. *Clark v. Fisher*, 1 Paige, 171, 177. *Clarke v. Sawyer*, 2 Barb. Ch. 411. 2 Comst. 498. *Mowry v. Silber*, 2 Brad. 133.)

VI. The proofs also establish the fact that the testator was led to execute a will doing such great injustice to the appellant and her daughter, by the false statements of John and Robert. (*Bleecker v. Lynch*, 1 Brad. 459. *Van Pelt v. Van Pelt*, 30 Barb. 134. *Whelan v. Whelan*, 3 Cowen, 537. *Crispell v. Dubois*, 4 Barb. 393.)

R. P. Wisner, for the respondents. I. The appellant claims that there was no evidence before the surrogate that the witnesses to the will were requested by the testator to sign their names as such witnesses. The request to persons to become witnesses to a will may be made by signs, as well as words. Any act by the testator, denoting his wish, is a compliance with the statute. (23 N. Y. Rep. 9.) The testimony of Robert Gamble and Michael Kelley clearly shows the request of the testator to both of the subscribing witnesses, to be present on the occasion for that special purpose. The act of the testator at the time, in exhibiting the will to each of the persons and declaring it to be his last will, is sufficient.

II. The appellant further claims that the testator declared the instrument to be his last will and testament before he subscribed his name thereto. The proof shows that the testator, at the time of making the subscription, declared the instrument "to be his last will and testament." The statute does not require the declaration to be after the name is attached, if done at the same time, and before the business is

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finally closed. (See 16 Barb. 141; 2 id. 200, 385, 394; 3 Brad. 78.) The testimony of Gamble would show that the declaration was after signing; while that of Kelley shows it was before. But both show that it was concurrent with the signing. It would be a forced construction of the third subdivision of the section of the statute referred to, to hold that the testator must go through with the mechanical operation of the pen before he announces the fact that his wishes, in regard to the disposition of his property after his death, are spread on paper. The signing is but the consummation of the act, and if done simultaneously with the declaration, it must be treated as a substantial compliance with the statute.

III. It is claimed by the appellant that there were no attesting witnesses to the will, who subscribed their names at the end thereof, as required by law. So far as the form of the will is concerned, as written out on paper, the witnesses both subscribed their names literally "at the end of the will." The attestation clause is written immediately after the date of the will, and signed by the witnesses, with their places of residence. The statute was not intended to prescribe the precise position; or locality, which the names of the witnesses should occupy on the paper; but rather that the names should appear as witnesses to the whole will, and be subscribed there after the full completion of the will.

IV. Upon the question of undue influence, there was conflicting evidence. The surrogate who had the best opportunity of judging which class of evidence was nearest the truth has admitted the will to probate. The rule that questions of fact are not to be reviewed, unless under peculiar circumstances, applies to this case.

V. The allegation that the testator was of unsound mind and incapable of making a will, presents a question purely of fact. The court below must have had a better opportunity of judging of this, upon the whole evidence, than the appellate court can have.

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By the Court, WELLES, J. It is objected on the part of the appellant, that the will of David Gamble was not executed according to the statute. The subscribing witnesses were Philip Woodruff and Michael Kelley. The former died after the will was executed, and before the death of the testator. Kelley was sworn and examined as a witness before the surrogate, and testified that he saw the testator sign the will. That he executed it in the presence of the witness. That the testator took up the will before he signed it and turned to Woodruff and called him by name, and then turned to the witness and called him by name and said, "That is my last will and testament." That the testator then took a pen and wrote his name to it. That Woodruff then took the paper from the table and subscribed his name to it, and handed it to the witness, who signed his name to it. That when the witness commenced writing his name, the testator told him he must name the town and county he lived in. The witness then wrote his name and place of residence, and gave the paper back to Woodruff. That at this time the two subscribing witnesses and the testator, David Gamble, were all in the room together. Robert Gamble, a son of the testator, testified that he was in the room when the will was executed. He says, "I was sitting about five feet from the table where father, Mr. Woodruff and Mr. Kelley were sitting. My father signed it and handed it to Mr. Woodruff, and he signed it and handed it to Mr. Kelley, who also signed it. My father held the will up to the men and said, 'This is my last will and testament;' and when he said this he handed it to Mr. Woodruff. Mr. Woodruff signed his name and handed it to Mr. Kelley. Mr. Kelley wrote his name. Mr. Kelley said, 'I suppose this is all you want of me,' and Mr. Woodruff said 'Yes.'"

On cross-examination this witness testified that he could not say whether the testator declared the paper to be his last will and testament before or after he signed his name. That he did not watch to see whether the will was properly exe-

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cuted. That his attention had not been called to the precise order in which the business was done until the day of his examination. The foregoing is the substance of the evidence of what occurred on the occasion of the execution and publication of the will. The will was drawn by Woodruff, one of the witnesses to its execution. It appeared that before the will was drawn the testator had designated Woodruff and Kelley as such witnesses. He sent for Kelley on the occasion for that purpose, and when asked by the messenger, his son, whether Kelley was the only witness he wanted, he replied, no, but that Mr. Woodruff could be a witness.

The particular objections to the execution and publication of this will are, first, that it is not shown that the testator requested either of the subscribing witnesses to sign it as such witnesses; second, that the statute requires the testator, at the time of subscribing the will &c. to declare the instrument *so subscribed* to be his last will and testament; and that the evidence shows that such declaration was not made after the testator had subscribed the instrument; that the statute requires the instrument to be subscribed by the testator before he makes the declaration. The language of the statute is as follows: "Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner: 1st. It shall be subscribed by the testator at the end of the will. 2d. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made, to each of the attesting witnesses. 3d. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament. 4th. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator." (2 R. S. 63, 5th ed. 144.)

The first two of these requirements appear to have been complied with. The objections to the sufficiency of the proof

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of the will arise under the 3d and 4th subdivisions. In regard to the third, namely, that the testator did not declare the instrument to be his last will and testament, after he had subscribed it, the exact question has been twice decided in this court; once in the third district, (*Doe v. Roe*, (2 Barb. 200,) and once in the 5th district, (*Keeney v. Whitmarsh*, 16 id. 141.) Both cases are exactly in point, and are authority with us, and are point blank against the appellant. In both cases the declaration was made before the wills were signed by the testator, and not afterwards, and it was held in each case that the 3d subdivision of the section cited was complied with. It was held in both cases, as it has been in many others which could be referred to, that the statute prescribing the manner of executing and attesting last wills and testaments, does not require a literal compliance with its provisions; but that a substantial observance of them will be regarded as sufficient. The case of *Coffin v. Ex'rs of Coffin*, (23 N. Y. Rep. 9,) is a strong illustration of this principle.

The remaining objection to the manner of proving the will in question, namely, that the evidence does not show that the witnesses were requested by the testator to sign the will as witnesses, cannot be maintained. In the case of *Coffin v. Ex'rs of Coffin*, (*supra*,) it was held that the testator's request to the witnesses to subscribe the attestation might be made through any words or acts which clearly evince that desire to them. Let us test this question in this case by that rule. The attendance of the witness Woodruff was procured by the testator for the purpose, as well to be a witness to his will, as to write it. The testator had procured the attendance of Kelley for the sole purpose of his becoming a subscribing witness. He knew they were both to be subscribing witnesses. They were in the same room with him, sitting at the same table, at the time he subscribed the will. After he had subscribed it he handed it to Woodruff, who subscribed it as a witness, in his presence, and handed it to Kelley, who signed the attestation clause. When the latter began to

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write his name, the testator told him he must name the town and county he lived in, thus showing that he knew what Kelley was doing, and giving him directions as to the manner in which he should become a subscribing witness. For what purpose did he pass the paper to Woodruff, except that he might subscribe it as a witness, which was one of the objects for which he procured his attendance? It seems to me that the evidence shows very clearly that the testator desired both Woodruff and Kelley to subscribe the will as witnesses, and that such desire was unmistakably manifested at the time by his acts and declarations; and if that was so, it was a valid attestation.

The only remaining questions in the case are whether at the time of the execution of this will the testator was of sound and disposing mind and memory, and was free from any undue influence in the dispositions he thereby made of his estate. I have looked carefully through all the evidence, and am constrained to say that the evidence taken all together, in my opinion, comes short of establishing either of those propositions.

The mind is impressed with the apparent injustice to his wife and his daughter Elvira, towards whom, the evidence shows, he entertained ordinary feelings of natural affection. Such a circumstance is always evidence to be taken into consideration in examining the question of a testator's soundness of mind at the time of making a disposition of his property by will. But it is only a circumstance, and I believe has never been regarded as sufficient, alone, to invalidate a will. A man has the right by law to make whatever disposition of his property he chooses, however absurd or unjust.

Upon the whole I am of the opinion that the order or sentence of the surrogate should be affirmed with costs.

RIGNEY and KIRLEY *vs.* SMITH.

Where B., with the intent to hinder and delay his own creditors, falsely and fraudulently held out to the public and pretended that personal property bought and paid for by him, and then in his possession, belonged to M., the lease of the store being in the name of M. and his name upon the awning; *Held* that after a creditor of M. had levied upon the property as M.'s B. could not be permitted to allege that the property belonged to him, instead of M.

THIS action was brought by the plaintiffs as assignees of Bartholomew O'Brien, to recover the value of certain articles of personal property taken from him by the defendant. The defendant justified as sheriff of Monroe county, under a judgment and execution in favor of G. A. Madden, against one Michael O'Brien. The proof showed that several years prior to 1855 Bartholomew O'Brien failed in business, and was then in embarrassed circumstances. In May, 1855, having accumulated about \$1300, he desired to go into business. He could not do so in his own name, in consequence of the old debts, and applied to Michael for the use of his. A store was rented, and the goods were purchased, partly in Michael's name and partly in Bartholomew's. All the goods purchased in the name of Michael were paid for by Bartholomew. The license to sell liquor was taken in the name of Bartholomew, and every thing was in his possession and under his control as owner, he rendering no account whatever to Michael. In July, 1859, Bartholomew purchased a quantity of cigars, of the value of \$172, in his own name. At this time all his debts had been settled, and he had generally made all purchases in his own name, after 1858. In October, 1859, the defendant levied upon and took all the goods in the possession of Bartholomew, including said cigars. The plaintiffs offered to show that there was nothing owing to Madden, and that the execution was issued by connivance with Michael, to put him in possession. The court excluded the evidence. The court refused to allow the case to go to the jury, and directed a verdict for the defend-

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ant. The case came before this court on a motion for a new trial, on exceptions ordered to be first heard at a general term.

J. C. Cochrane, for the plaintiff.

W. F. Cogswell, for the defendant.

By the Court, WELLES, J. After the evidence was closed the counsel for the plaintiff requested permission to go to the jury on the question of property in the articles claimed, which the court refused and directed the jury to find a verdict in favor of the defendant. Exceptions were duly taken by the plaintiff's counsel. In considering these rulings and decisions, the plaintiffs are entitled to claim that the question be determined upon the aspect most favorable to themselves which the evidence presents; and if there is a conflict in the evidence, they are entitled to have their version prevail, in preference to that of the defendant.

As between Michael and Bartholomew O'Brien, I think, under the evidence, the latter would be clearly entitled to have the question of the title to the property submitted to the jury. The levy and sale by the defendant were in October, 1859. Bartholomew testifies that all his debts were settled six or seven months before the levy; that all the property in question was bought and paid for by him with his own means, and that it had all been in his actual possession from the time it was purchased until it was levied upon by the defendant. If the question was between Bartholomew's creditors and Michael O'Brien, there would be no doubt of the right of the former to take the property on their executions against Bartholomew.

The question is whether the creditors of Michael O'Brien can lawfully take the property on executions against him. The fraudulent arrangement between the brothers O'Brien was intended to keep at bay the creditors of Bartholomew, and had no reference to the creditors of Michael. The

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evidence will admit of the position or hypothesis, or at least tends to prove, that the property in question, in fact, all belonged to Bartholomew, and that Michael really had no title to or interest in any of it. It also proves that he held out to the public that it belonged to Michael. This was so from the time Bartholomew resumed business in Rochester in 1855, until in 1858, and in some respects down to the time of the levy by the defendant. The property was purchased by Bartholomew, sometimes in his own name and sometimes in the name of Michael, and bills taken in the same way, depending, as Bartholomew testifies, upon the parties of whom he purchased. The lease of the store was taken in the name of Michael, and his name was upon the awning. Michael paid all the gas bills, until shortly before the levy. Bartholomew testifies that whatever papers were executed were in Michael's name. That he was embarrassed and could not have things in his own name. These were all significant acts on the part of Bartholomew, tending strongly to mislead the public and to give the impression that the property and the business belonged to Michael. The leading object, as he now avers, was in substance to hold out to his own creditors that he did not himself own the property. When creditors approached him that was his language. It was at the same time necessary, in order to make the concealment the more complete and the false pretenses the more plausible, to have an owner of the property. The one selected was his brother Michael. Thus matters were allowed to proceed, so far as the eye of the public was concerned, until an execution creditor of Michael makes his appearance and the property is levied upon. Up to this time the lease remains in Michael's name and the sign on the awning continues as at the first. It does not appear that any demonstration was at any time made, which the public would discover, indicating a change of the ostensible ownership of the property. The sum of the whole matter is that he falsely and fraudulently held out to the public and pretended that the property belonged to

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Michael with the intent to hinder and delay his own creditors. The creditor of Michael has taken him at his word and seized the property as Michael's, and he cannot now be permitted to allege the contrary. If when, as he says, he had settled with all his creditors, some six or seven months before the levy, he had then assumed to be the owner and removed all the *indicia* to the contrary, hoisted his sign in his own name and proclaimed by the usual indications in such cases that he was the real owner, the case would perhaps be different. But I think he has waited too long. It is now too late, after the rights of another have attached, founded upon his former allegations and acts, to change his position and claim the property to be his own. In such a case it was the imperative duty of the jury to find for the defendant, and an express direction of the justice so to find, implies no more.

The motion for a new trial should be denied, and the defendant should have judgment upon the verdict.

[MONROE GENERAL TERM, March 2, 1863. *Johnson, J. C. Smith and Welles, Justices.*]

WILLIAM DICKEY and A. J. LAWRENCE vs. ERASTUS DICKEY.

Where a tenant for life of real and personal estate sells a part of the personal property, receives the money therefor, and loans the same, devisees in remainder cannot sue for the money, after the death of the tenant for life; there being no privity between them and the borrower.

APPEAL from a judgment of the county court of Steuben county, affirming the judgment of a justice of the peace, in favor of the plaintiff, for \$58.67, damages and costs.

G. H. McMaster, for the appellants.

F. C. Dininny, for the respondent.

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By the Court, WELLES, J. The case before the justice was this. Mathew Dickey of the town of Cameron, Steuben county, died in the month of April, 1856, leaving his last will and testament bearing date March 22d of the same year, by which he gave and devised to his wife, Ruth Dickey, all his estate real and personal, to have and to hold the same during her natural life, subject to the provision therein made in favor of his daughter, Harriet M. Dickey. He gave to his daughter Harriet, during her life, a certain room in his dwelling house, and provided for her support during her life. He gave legacies to three other daughters named, of \$30 each. To his son, Samuel Dickey, he gave a legacy of \$150. He devised to his son, Amasa Dickey, 10 $\frac{1}{4}$ acres, and to his son Erastus Dickey, the defendant, ten acres of land, both subject to the life estate before devised to his wife. He gave and devised all the residue and remainder of his real and personal estate to his son William Dickey, and his grandson William B. Lawrence, to be divided equally between them, share and share alike, subject to the life estate given to his wife, and subject also to the provisions made in favor of his daughter Harriet. The legacies mentioned were expressly charged and made liens upon the devise and bequest to his son William and his grandson William B. Lawrence. The testator appointed Jonas Scott executor of his will. The will was duly admitted to probate, but no letters testamentary or of administration have been issued to any one. Immediately upon the death of the said Mathew Dickey, his widow, the said Ruth Dickey, went into possession of the testator's estate, real and personal, and remained so in possession until her death, which happened on the 11th day of June, 1858. Sometime after the death of Mathew Dickey, and before the death of his widow Ruth Dickey the plaintiff, William Dickey sold for his mother, the said Ruth, one cow, one pair of steers, two other cows and two other steers of the property which she had received under the will of her late husband, for the aggregate sum of \$215. William

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Dickey got the money for all this, except a note of \$100, which his mother received. The case does not show the time when this sale took place; nor whether the note mentioned was ever paid; nor whom it was against, or where payable; nor whether it was collectible. A witness for the plaintiffs testified that about a year before the trial, which was June 14th, 1860, the defendant said he had \$50 of Ruth Dickey, and he would not pay it until the law directed him a way to pay it; that he did not know who it belonged to. On the 10th of October, 1857, William B. Lawrence sold his right and title to the property mentioned in the will of Mathew Dickey, to his brother Andrew J. Lawrence, one of the plaintiffs.

The action was brought upon the theory that if the money borrowed by the defendant of Ruth Dickey was part of the proceeds of the property sold for her by William Dickey, such money, at her death, belonged to the plaintiffs under the will of Mathew Dickey, and they have the right to follow it into the hands of the defendant and recover the same in this action. There are several answers to this claim of the plaintiffs.

1st. The evidence relied upon to prove that the money which the defendant had received of his mother, Ruth Dickey, was part of the proceeds of the sale of the property received by her under the will of Mathew Dickey was entirely insufficient to justify the conclusion that it was any part of such proceeds. All that it proves is that at some time the defendant had received \$50 of Ruth Dickey, his mother. There is nothing whatever in the evidence to connect this money with the property sold or its proceeds. The presumption that it was a part of such proceeds would be forced and unwarrantable. She was in possession of all her late husband's estate, real as well as personal, and the probability that the money she advanced to her son was received by her from other sources is quite as strong as that it was a portion of the proceeds of the property sold. It does not ap-

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pear that there were any incumbrances upon the life estate she received under the will, except the provision made in favor of her daughter Harriet. The devise in the will of real estate, as well as all the legacies, were subject to her life estate. She lived over two years after the death of her husband, and might well have accumulated beyond her expenses much more than this \$50. It is true it might have been such proceeds. But it is not proved to have been.

2d. Assuming that it was a part of the proceeds of such sale—that the note which she received had been paid to her—the evidence clearly shows that William Dickey, one of the plaintiffs, sold the property for her, and took \$115 in money, part of the proceeds, and the balance, \$100, which was a note, she received. It does not appear that she got the note tortiously, and the presumption is she received it with the consent of William, who was the active agent in the transaction; and he is not, as I think, at liberty to repudiate it. She was entitled to the use, during her life, of all the property sold, as well as all the rest of the estate of her deceased husband. The property sold was live stock on the farm, liable to various casualties, and it may well have been that the note of one hundred dollars was regarded by William and his mother as her just portion of the whole proceeds of the sale. Her age does not appear, but, assuming it to have been 70 years, she may have had a reasonable expectation of life of sufficient duration for the property to have very much deteriorated in value, by ordinary use, before the plaintiffs would have been entitled to its possession.

3d. The utmost the evidence shows against the defendant is that he is a debtor to the estate of his mother, Ruth Dickey, in the sum of fifty dollars, and interest from the time he received the money. There is no privity between him and the plaintiffs—no contract, express or implied, between them. He is liable to the legal representatives of his mother, and to no one else. The plaintiffs cannot employ

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the instrumentality of a court of law to reach this money, even upon their own theory.

The judgment of the county court, and that of the justice, should be reversed.

[MONROE GENERAL TERM, March 2, 1863. *Johnson, J. C. Smith and Welles* Justices.]

TALMAN vs. SMITH, Sheriff, &c.

When a mortgagor of chattels is in default in not paying the mortgage debt, the mortgagee has a right to take the property into his possession and dispose of it at his pleasure.

If, after forfeiture, the mortgagee sells the property to a third person, with the consent of the mortgagor, this will be equivalent to a formal foreclosure of the equity of redemption.

And the title of the purchaser cannot be assailed by creditors of the mortgagor having no lien upon the mortgaged property at the time of his purchase.

One purchasing the property from the mortgagee, and taking possession after forfeiture of the condition of the mortgage, at a time when there was no creditor in a situation to object to the sale, and continuing in possession, is to be deemed, *prima facie*, the absolute owner, and is not bound to go further, in the first instance, and account for the possession of the mortgagor during the existence of the mortgage.

No presumption of fraud in the purchase exists by reason of the previous possession of the mortgagor; and a creditor of the mortgagor, asserting such fraud, holds the affirmative, and is bound to establish it by proof.

The want of possession in the mortgagee is not sufficient evidence, of itself, to authorize the presumption of fraud.

ACTION to recover the possession of personal property. Defense that it was the property of James W. Sawyer, and that it was taken by the defendant, as sheriff of Monroe county, under an execution issued upon a judgment recovered in this court against him. On the 1st October, 1849, James W. Sawyer conveyed to one McIntosh certain real estate, consisting of a block of stores on the corner of Mumford and State streets, the house and lot where he and his family

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resided, corner of Ann and Sophia streets, and a house and lot on Sophia street, in the city of Rochester. McIntosh, on the same day, conveyed the premises to Mrs. Sawyer, the wife of James W. Sawyer. On the same day, Oct. 1, these deeds were both recorded, in the clerk's office. On the 22d of January, 1856, Mr. and Mrs. Sawyer conveyed to Caroline E. Wilson the house and lot on Sophia street, for the consideration of \$2400. The purchase money was paid to James W. Sawyer. There was evidence tending to show that the purchase money was received by Sawyer under an arrangement between him and his wife that he should receive and invest it for her. There was also evidence tending to show the contrary. In 1833, George Caldwell, a brother of Mrs. Sawyer, died, leaving a will, by which he bequeathed to her a legacy which amounted, at the time it was paid over to her, to \$1500. This legacy was paid over to Mr. Sawyer in 1850. There was evidence tending to show that when Sawyer received this money he agreed with his wife that he would take and invest it for her. There was also some evidence to the contrary. In October, 1858, Sawyer became insolvent, and made an assignment to S. M. Spencer and W. C. Rowley. Before making this assignment, he paid over to his wife the money he had received as the purchase money of the property sold to Mrs. Wilson, with interest, and the amount of the legacy from George Caldwell, with interest, after deducting what he had previously paid. The whole amounted to \$4300, and was paid in a note of S. M. Spencer & Co. for \$1800, and cash. On the 6th of October, 1858, James W. Sawyer executed and delivered to S. M. Spencer & Co. a chattel mortgage, to secure the payment of a promissory note which they had loaned him, for his accommodation, payable in 63 days, by which Sawyer mortgaged the property in question in this action. This note was afterwards paid by S. M. Spencer & Co. The property mortgaged was household furniture, and was in the house on the corner of Ann and Sophia streets, where Mr. and Mrs. Sawyer resided. Whether the

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mortgage was made in good faith was made a question before the jury. The mortgage having become forfeited, Mrs. Sawyer, on the 24th of December, 1858, purchased the property of the mortgagees. The defendant seized the property under an execution issued upon a judgment recovered by Henry L. Fish and others against Sawyer, on the 25th of March, 1859. After the levy Mrs. Sawyer sold the property to the plaintiff, who, after demand of the property, and refusal, brought this action.

The court, in submitting the case to the jury, instructed them that the onus of showing that the mortgage under which the plaintiff claimed title, was made in good faith, rested on the plaintiff, and that the mortgage was presumed to be fraudulent. To this the plaintiff excepted. The court also instructed the jury that Sawyer had no right to pay his wife the money received on account of the legacy of George Caldwell, even if they should find that he received the same upon an agreement to invest the same for her. To this the court also excepted. The court further instructed the jury that if Mrs. Sawyer permitted her husband to take the \$2400 received on the sale of the property to Mrs. Wilson, in his own name, and use it as his own, the law presumed a gift, and the money became the money of the husband and his creditors; to which the plaintiff's counsel excepted.

The jury found a verdict for the defendant, and the court directed this motion for a new trial to be heard at the general term, in the first instance.

W. F. Cogswell, for the plaintiff.

T. R. Strong, for the defendant.

By the Court, WELLES, J. The justice at the circuit instructed the jury that as possession of the property in question was not changed at the time the mortgage was given by James W. Sawyer to S. M. Spencer & Co., the burthen was on the

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plaintiff of showing that the mortgage was made in good faith and without any intent to defraud creditors ; because Mrs. Sawyer purchased the property of the Spencers while the same was in the possession of Mr. Sawyer, and therefore she and the plaintiff, in reference to the property, stood in the same position as S. M. Spencer & Co. would, if they were prosecuting this action, and no better. In these respects I think the learned justice fell into an error.

The mortgage vested the legal title to the property in the Spencers, as against Sawyer the mortgagor, subject to be defeated by performance of the condition of the mortgage. The condition not having been performed, the title at law, as between the parties to it, vested absolutely in the mortgagees, divested of the condition of the grant contained in the mortgage ; leaving only an equity of redemption in the mortgagor. When Sawyer was in default in not paying the note to secure which the mortgage was given, at its maturity, the Spencers had a right to take the property into their possession and dispose of it at their pleasure. This right continued until they sold the property to Mrs. Sawyer, on the 24th of December, 1858, a few days, only, after the forfeiture of the condition of the mortgage. The sale was with the consent of the mortgagor, which was equivalent to a formal foreclosure of the equity of redemption. The right of the mortgagees to the property, as the legal owners, and to take it into their possession, was as perfect upon the failure of the mortgagor to perform the condition of the mortgage as it would have been in case they had sold it under the mortgage and become the purchasers at such sale. These propositions, I apprehend, cannot be controverted. Up to the time of Mrs. Sawyer's purchase, the creditor at whose instance the property was afterwards seized by the defendant, had no judgment against Sawyer the mortgagor, and did not obtain one until three months thereafter. He therefore had no lien upon the property in question, when Mrs. Sawyer purchased. At this time the failure of Spencer & Co. to take possession could not be

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alleged by this creditor, as he had no judgment or execution to enable him to attack the validity of the mortgage. Before the sale by the Spencers to Mrs. Sawyer, the actual possession was in James W. Sawyer, her husband, and upon the sale the possession became, *eo instanti*, transferred, by operation of law, to Mrs. Sawyer. No manual change or handling or moving of the property was necessary. Her possession was all that the nature of the case admitted. She and her husband lived together, and kept house for years before and at the time of these transactions, in the same house, the title of which was in Mrs. Sawyer, where the property had always been, so far as the case shows.

Mrs. Sawyer's title to the property in question having thus been acquired from the Spencers at a time when the creditor now attempting to impeach it had no lien upon the property by judgment or execution, and was therefore not in a condition to assail its validity as against the Spencers, and she having been in the actual possession ever since her purchase, she was, *prima facie*, the absolute owner, until she conveyed the property to the plaintiff, who was not bound in the first instance to go further, and account for the possession of Sawyer during the existence of the mortgage, and before the purchase of Mrs. Sawyer. No presumption of fraud in her purchase existed by reason of such previous possession of her husband. And if not, the defendant held the affirmative, and was bound to establish the fraud by proof.

The charge, however, cast the burthen upon the plaintiff of proving that there was no fraud, and if he had given no evidence to overcome such assumed presumption, or not sufficient, in the opinion of the court, to be submitted to the jury, the plaintiff should have been nonsuited. The effect of the instruction to the jury was, that they were to start, in their examination, with the assumption that the mortgage was fraudulent, by reason of the want of possession in the mortgagees, and then to examine the evidence and see whether the plaintiff had proved that it was given in good faith and

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without a fraudulent intent. Instead of that, they should have been advised that the want of possession in the mortgagees was not sufficient evidence, of itself, under the circumstances of the case, to authorize the presumption of fraud. The late case of *Allen v. Cowan*, in the court of appeals, (23 N. Y. Rep. 502,) is very much like the present, in its leading features, and, as it seems to me, clearly sustains the foregoing views.

If, in the case at bar, the Spencers had not sold the property, or taken possession of it, and they had brought the action against the defendant for seizing it, the rule invoked by the defendant in this case would have been directly applicable, and the plaintiff in the case supposed would have been, beyond all controversy, required to account for the possession in *Sawyer*, and show that the mortgage was given in good faith and without any intent to defraud.

But in this case the Spencers have sold the property to a purchaser who took immediate possession, and at a time when there was no creditor who was in a situation to object to the sale, and she has continued in possession until it was taken by the defendant.

The charge of the judge that Mrs. Sawyer and the plaintiff stood in the same position as the Spencers would, if they were prosecuting the action, and no better, was therefore also erroneous.

As the foregoing views lead inevitably to a new trial, it becomes unnecessary to decide the other questions raised and discussed upon the argument.

A new trial should therefore be ordered, with costs to abide the event.

[MONROE GENERAL TERM, March 2, 1863. *Johnson, J. C. Smith and Welles*, Justices.]

ALBA LATHROP *vs.* WILLIAM SINGER and ELIZABETH SINGER.

The homestead exemption act, passed April 10, 1850, does not contemplate the exemption of a homestead from sale on execution issued upon a judgment for a cause of action sounding in *tort*; nor on an execution issued in such action on a judgment for the defendant for *costs*.

THIS was an action of ejectment. The defendants were husband and wife. On the 29th of March, 1851, B. McFarlin and wife conveyed the premises in question to the defendant William Singer. On the 4th of April, 1854, he conveyed the same to Elizabeth Singer, then Elizabeth Knowles; and on the 19th day of the same month, William Singer and Elizabeth Knowles intermarried. On the 15th of April, 1857, Elizabeth Singer filed and recorded, in due form, a notice of exemption, of the premises, under the homestead exemption act, passed April 10, 1850. Previous to her marriage, Mrs. Singer had three children, two of whom were adopted, for whom she provided, then residing on said premises, and for whom she has ever since provided. In July, 1857, an action was commenced in the names of Mr. and Mrs. Singer, against Alba Smith, for an assault committed on Mrs. Singer. On the 4th of April, 1859, Smith recovered a judgment, in that suit, against Mr. and Mrs. Singer, for \$102.73, costs and expenses in defending it, which was docketed on the same day, and on the same day an execution was issued thereon to the sheriff of Monroe county, by virtue of which the sheriff, on the 30th of June, 1859, sold the premises in question to the plaintiff in this suit, and executed to him a certificate of sale, and on the 16th day of October, 1860, he executed and delivered to him a sheriff's deed, in the usual form. This action was brought to recover the possession of the premises. At the close of the testimony the court held that there was no question of fact for the jury; to which the defendants excepted. The defendants' counsel then asked the court to decide that the defendants were entitled to judgment, on the evidence, in

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accordance with the affirmative relief prayed for in the answer, viz. that the judgment in favor of Alba Smith, against the present defendants, be set aside as irregular and void. This the court declined to do, and the defendants excepted. The court then ordered the jury to find a verdict for the plaintiff, with six cents damages; to which the defendants excepted. Thereupon the court ordered the case and exceptions to be heard in the first instance at a general term of this court.

George B. Brand, for the defendants.

A. Lathrop, plaintiff, in person.

By the Court, WELLES, J. The legal title to the premises in question must, as between the present parties, be deemed to have become vested in the defendant Elizabeth Singer, by the deed to her by the name of Elizabeth Knowles, from the defendant William Singer, dated April 4th, 1853, and before the intermarriage of the defendants. The judgment for costs in favor of Alba Smith against the present defendants, in the action brought by them against said Smith for an assault and battery alleged to have been committed upon the said Elizabeth after her intermarriage with William Singer, in which action the complaint was dismissed, was perfected April 4th, 1859; and from that time became a valid lien upon the real estate of both, and each of the present defendants. (2 R. S. 359, § 3. *Marsh v. Potter and wife*, 30 Barb. 506, and authorities cited.) The formal objections to the judgment roll, if not frivolous, are certainly untenable in this action. The papers constituting it are carelessly arranged, but on looking it through, enough appears to show that a judgment was obtained for the amount for which the execution was afterwards issued. We find embraced in the roll the summons, complaint, answer, order for dismissal of complaint, and final judgment in favor of

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the defendant therein, against the present defendants for \$102.73 costs of the defense, in due form, signed by the clerk. If there were formal irregularities, they should be corrected on a direct motion to the court for that purpose. They are not such as to render the judgment void, and therefore are not assailable in this collateral way. Upon this judgment an execution was regularly issued, in the usual form, against the personal and real property of these defendants, under and by virtue of which the premises in question were sold by the sheriff to the present plaintiff, and in due time conveyed to him by the sheriff. Thus the plaintiff established *prima facie* his right to recover possession of the premises.

The defense set up at the trial was that the premises in question were not liable to levy and sale on execution, but were exempt therefrom by virtue of the act entitled "An act to exempt from sale on execution the homestead of a householder having a family," passed April 10th, 1850. (*Laws 1850, ch. 260, p. 499.*) And for that purpose the defendants gave in evidence a notice by the defendant Elizabeth Singer, dated April 15th, 1857, in the form and to the effect contemplated by the second section of the act, which was duly acknowledged and recorded on the day of its date. This defense, we think, cannot prevail. The act referred to does not contemplate an exemption of the homestead from sale on execution issued upon a judgment for a cause of action sounding in *tort*, nor on an execution issued in such action on a judgment for the defendant for costs. The first section exempts the homestead from sale under execution *for debts thereafter contracted*, to the value of one thousand dollars. The second section, after providing what shall be done to entitle any property to such exemption, declares that no property shall be exempt from sale under the act, *for a debt contracted* for the purchase thereof, or prior to the recording of the deed or notice mentioned in the previous part of the same section.

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There is no language to be found in the act indicating an intention to exempt from sale any property on judgments, except for debts contracted. If the intention had been to extend the exemption to sales under all judgments recovered, it would have been quite easy to have so expressed it, and it is most likely if that had been the intention that it would have been so expressed in the act. The omission to do so, and the limitation in words to debts contracted, afford pregnant evidence that the legislature did not intend to extend its operation beyond the cases expressed. (*Schouton v. Kilmer*, 8 How. Pr. R. 527.) In the case of *Cook v. Newman*, in the same volume, (p. 523,) the opinion of the judge deciding it seems to be directly adverse to the decision. His reasoning establishes that a promise of marriage is not indebtedness within the act referred to, and yet he holds that the homestead is exempt from sale on a judgment recovered for that cause of action.

The offer of the defendants to prove that they had personal property sufficient to satisfy the execution was properly overruled. The defendants should have applied for relief in the action in which the execution was issued, or moved to vacate the sale on that ground. They cannot set it up in this action, as a defense. (*Whitaker v. Merrill*, 28 Barb. 526, and authorities there cited.)

The motion for a new trial should be denied, and the plaintiff should have judgment on the verdict.

Ordered accordingly.

[MONROE GENERAL TERM, March 2, 1863. *Johnson, J. C. Smith and Welles* Justices.]

AIKEN & KETCHUM vs. BENEDICT.

Where one erects a building upon the line of his own premises, so that the eaves or gutters project over the land of his neighbor, this is not such an encroachment upon the possession of the latter as will sustain an action of ejectment.

An action for a nuisance is the appropriate remedy in such a case.

THIS was an action of ejectment, tried at the Monroe circuit, in October, 1861. There was but one exception taken, which was to that part of the charge of the court to the jury, in which it was stated, as matter of law, that for the projecting of the defendant's eaves, or gutters, over the land of the plaintiffs, an action of ejectment would not lie. The jury found a verdict in favor of the defendant.

M. S. Newton, for the plaintiffs.

George W. Miller, for the defendant.

By the Court, WELLES, J. This was an action of ejectment to recover a strip of land about two feet in width, running from the front to the rear of lot sixty-eight, in the Atwater and Andrews tract, in the city of Rochester. The plaintiffs were the owners of the south half of said lot 68, and the defendant the owner and in possession of the north half of said lot ; and the question on the trial was, whether the defendant had encroached on the land of the plaintiffs. The defendant's house was on the line between his half of the lot and the other half, owned by the plaintiffs. It appeared, beyond controversy, that the eaves or gutters of the defendant's house, on the south side, projected over the land of the plaintiffs. The justice before whom the cause was tried held and instructed the jury that for this encroachment the plaintiffs could not recover in an action of ejectment ; to which the plaintiffs' counsel excepted. The

jury returned a verdict for the defendant, and the plaintiffs now moved for a new trial.

By the revised statutes, the action of ejectment was retained, and might be brought in the cases, and in the manner theretofore accustomed. It might also be brought, 1. In the same cases in which a writ of right might be brought, &c. 2. By a widow to recover dower, &c. (2 *R. S.* 303, §§ 1, 2.)

The cases in which the action may be brought are not extended by the code. The present case is not within the two cases above mentioned, in which the revised statutes extended the action to cases not before provided for. If the action can be sustained in this case, therefore, it must be upon the law as it stood before the adoption of the revised statutes.

By the common law, ejectment will not lie for any thing whereon entry cannot be made, or of which the sheriff cannot give possession. (2 *Crabb on Real Property*, 710, § 2484.) It cannot be sustained for the recovery of property which in legal contemplation is not tangible. (4 *Bouv. Inst.* § 3653.) The injury or wrong for which the action can be maintained must in fact, or in law, amount to an *ouster* or dispossession of the plaintiff. (*Id.* § 3655.) The general rule is that ejectment will lie for any thing attached to the soil, of which the sheriff can deliver possession. (*Jackson v. May*, 16 *John.* 184.)

The plaintiffs claim that the word land, in its legal signification, embraces not only the face of the earth, but every thing above and below it; and they invoke the maxim, *cujus est solum, cujus est usque ad cælum*; and therefore that no man may erect a building or the like, to overhang another's land. That the defendant having erected his house so that the eaves overhang their land, he has unlawfully taken possession of so much of their land as the eaves occupy directly over their soil or the surface of their land.

This was undoubtedly a violation of the rights of the plaintiffs; but we think ejectment, or an action to recover

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the possession of real estate, was not the appropriate remedy. Of what has the defendant taken possession which belongs to the plaintiffs? Clearly nothing but an open space of air over the material land of the plaintiffs. How could the sheriff put the plaintiffs in possession of that space? It is not perceived how it could be done. If it could be done in one case it could in every case, without reference to the locality of the space, provided it be superincumbent to the plaintiffs' soil.

The books furnish but a single case, so far as I have been able to discover, where ejectment was sustained under like circumstances; and yet if the action would lie, it is remarkable that no other case has been reported to that effect, either in some one of the United States or in England. The books, from the earliest reports in the English language, wherever the common law has prevailed, down to near the present time, are full of cases of actions of trespass on the case for nuisances, under circumstances similar in principle to the present.

The action for a nuisance is an effectual remedy for just such a case; for if the defendant should be convicted, the judgment would be for damages and an abatement of the nuisance. (2 *R. S.* 332, §§ 1-7, and *Code*, §§ 453, 454.)

The case above referred to, where ejectment was maintained, is that of *Sherry v. Frecking*, (4 *Duer*, 452,) where the wall of the defendant's house overhung the plaintiff's lot. The point appears, by the report of the case, to have been decided with little or no consideration, and without referring to a single authority to show that ejectment would lie. The court admit that the claim is a novel one, but remark that they do not see why it is not well founded, nor why, if A. builds over, though not upon B.'s land, B. may not have his remedy by ejectment. The only reason assigned is in the following words: "The action is for the recovery of real property, a term which is synonymous with 'lands, tenements and hereditaments.' (*Code*, § 462.) 'Land,' it

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need hardly be said, extends upwards as well as downwards, as far as the convenience of the subjacent soil may see fit to extend it. (3 Kent, 457.)"

In *Buller's Nisi Prius*, 99, it is said that "ejectment will lie for nothing of which the sheriff cannot deliver execution. Therefore it will not lie for a rent, common or other thing lying in grant, *quæ neque tangi nec videri possunt*;" those things that can be neither felt nor seen.

The motion for a new trial should be denied.

[MONROE GENERAL TERM, March 2, 1863. *Johnson, J. C. Smith and Welles, Justices.*]

JONES vs. HURLBURT, Sheriff, &c.

Before evidence of the acts and declarations of persons not parties to an action can be properly received in evidence, on the ground of there having been a common intent or purpose to hinder, delay or defraud creditors, the common unlawful design should be clearly proved, as a condition precedent. Evidence which is merely admissible on the question of the common illegal purpose, is not sufficient.

If the evidence given with a view to establish the fact either that there was an unlawful compact for the purpose mentioned, or the connection of a party to the suit with it, is merely competent upon the question, but insufficient to establish the fact, evidence of the acts and declarations of the parties to the compact is inadmissible.

It is the province of the judge, and not of the jury, to pass upon the question whether there was a common intent or purpose to defraud among the parties whose declarations are sought to be proved.

THIS was a motion by the plaintiff, for a new trial, upon a case and exceptions ordered at the circuit to be heard at the general term, in the first instance. The action was brought for the recovery of certain personal property alleged to belong to the plaintiff and to have been taken and unlawfully detained by the defendant, who was sued as sheriff of Livingston county. The defendant, by his answer, admitted

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the taking, and in justification thereof alleged that he took the property as sheriff, by virtue of an execution issued on the 1st of July, 1859, for the enforcement of a judgment recovered in June, 1859, by John and Alexander Clunas against William T. Cuyler. That the property belonged, at the time, to William T. Cuyler, and was in his possession. That the plaintiff claims the property by virtue of a mortgage executed by Stephen P. Slocum; and that Slocum claimed the property by purchase from George M. Cuyler and William B. Wooster, assignees of William T. Cuyler. That the assignment of Cuyler was made to defraud his creditors. And that the mortgage by Slocum was made for the same purpose. Upon the trial the plaintiff was the only witness called to make out his case. He proved the execution and delivery of a mortgage by Stephen P. Slocum to himself, on the 1st day of September, 1859, given to secure the payment of a note for \$1200 to one Powers, on which the plaintiff was indorser. And that at a sale of the property for forfeiture of the condition of the mortgage, in November, 1859, the same was bid in by or for the plaintiff. The defendant proved the judgment and execution set forth in the answer; a levy on the property, August 10, 1859; that it was then on the premises where William T. Cuyler resided; that the plaintiff claimed the property as having been purchased by him at the sale under the mortgage. Thereupon the defendant offered to prove the declarations of William T. Cuyler, George M. Cuyler, and the plaintiff, on the ground that the evidence educed proved, or tended to prove, a common intent or purpose to hinder, delay or defraud the creditors of William T. Cuyler. And for that purpose, also, to introduce the assignment of said Cuyler, and evidence of other sales, transactions and conveyances, including the mortgage in question, and a prior mortgage; and proposed to prove the declarations of said William T. Cuyler relating thereto. The plaintiff objected to the admission of this evidence: 1st. That the declarations of

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Cuyler were incompetent evidence against the plaintiff, being mere hearsay. 2d. That there was no evidence tending to show such alleged common intent. The court, however, overruled the objection, and decided to admit the testimony, on the ground that there was evidence tending to show such common intent or purpose. The plaintiff excepted. The defendant thereupon proved by Wooster declarations of William T. Cuyler, made in August, 1857, after the execution of the assignment, as to its object, and his wish that the witness should cover up his property, and be as poor as he could, &c. Also William T. Cuyler's controversies with the witness as to the management of the assigned property, and his wishes in regard to the disposition of it. Under the same objection and exception Asa D. Smith was permitted to testify to declarations of George M. Cuyler and William T. Cuyler in reference to the assignment; the intent with which it was made; transactions with them in regard to the property, &c., all happening after the assignment, in August, 1857. Ephraim Willard was also allowed, under the same objection, to testify to declarations of George M. Cuyler, made after the assignment, to the effect that they had fixed their affairs so as to save something from their creditors; and to declarations of Stephen P. Slocum, made in May, 1859. Hugh McCartney was permitted to give evidence of George M. Cuyler's declarations, verbal and in writing, made in December, 1857, by which he claimed certain other property to be his. A. M. Wooster was permitted to testify to acts and declarations of W. T. and Geo. M. Cuyler in October, 1857, in regard to other property. At none of the conversations was the plaintiff present. Nor was he shown to have had any thing to do with William T. Cuyler, or his debts, to have known his plans, or even to have held at any time any communication with him or Geo. M. Cuyler.

The jury found a verdict for the defendant, and assessed the value of the property at \$2000.

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Geo. F. Danforth, for the plaintiff.

Scott Lord, for the defendant.

By the Court, WELLES, J. It is a general principle of the law of evidence that the declarations or admissions of one not a party to the action cannot be received in evidence, unless they constitute a part of the *res gestæ*. To this rule there are exceptions; as in cases of privies in blood, in estate and law; of deceased persons against their interests; of one copartner against another; and of an agent against his principal—together with other kindred cases—in which the admissions &c. made by a privy, in order to be admissible, must have been made while he owned the estate of the deceased person, while his interest existed; of the partner, while the partnership or joint interest existed; and of the agent, contemporaneously with some act of the agent within the scope of his agency, to which the declarations or admissions relate. Another case where the declarations of persons other than parties to the action may be proved, and resting upon the same principles as those before stated, is that of a company of conspirators or persons engaged in a common design to accomplish an unlawful act, where the result to be effected by such common design is material upon the issue to be tried. “The connection of the individuals in the unlawful enterprise being shown, every act and declaration of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is, therefore, original evidence against each of them.” * * * In such case “care must be taken that the acts and declarations, thus admitted, be those only which were made and done during the pendency of the criminal enterprise, and in furtherance of its objects. If they took place at a subsequent period, and are therefore merely narrative of past occurrences,

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they are to be rejected.” (1 *Gr. Ev.* § 111. *Waterbury v. Sturtevant*, 18 *Wend.* 353.)

On the trial of the present case the plaintiff gave evidence which, *prima facie*, entitled him, under the pleadings, to a verdict, and rested. His title to the personal property, to recover which the action was brought, was derived through a chattel mortgage given by John P. Slocum to the plaintiff to secure the payment of a note of Slocum for \$1200, indorsed by the plaintiff, dated September 1, 1859, and payable in three months, at a bank in Rochester; a sale under the mortgage, and the property on that sale purchased by and for the plaintiff; and that Slocum was in possession of the property, claiming title at the time the mortgage was given. The defendant, after he and William R. Wooster had been examined as witnesses in his behalf, proposed to prove the declarations of William T. Cuyler, George M. Cuyler, Stephen P. Slocum and the plaintiff, on the ground, as stated in the case, “that the evidence educed proved, or tended to prove, a common intent or purpose to hinder, delay or defraud the creditors of William T. Cuyler, and for the purpose, also, to introduce the assignment of said Cuyler, and evidence of other sales, transactions and conveyances, including the mortgage in question and the prior mortgage made for such purpose, in accordance with the allegations in the answer of the defendant and the opening of his counsel.” He proposed, 1st. To prove the declarations of said William T. Cuyler relating thereto. The counsel for the plaintiff objected to such evidence, on the grounds: 1. That evidence of the declarations of said Cuyler were incompetent, against the plaintiff, and were mere hearsay. 2. That there was no evidence tending to show said alleged common intent. The circuit judge overruled the objection, and decided to receive the evidence offered, on the ground that there was evidence tending to show such common intent or purpose, which would be among the questions for the jury. To which decision the counsel for the plaintiff in due form of law excepted. Evi-

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dence was then given, by a number of witnesses, of a variety of declarations and acts of the said William T. Cuyler and George M. Cuyler, and some of Slocum, tending to show that the assignment by William T. Cuyler of his property to George M. Cuyler and William B. Wooster, in trust, for the benefit of the creditors of the assignor, which was given in evidence, was fraudulent and void, but none, of the plaintiff, tending in the slightest degree to implicate him in such fraud, or in any combination with the others or any one else, with intent to hinder, delay or defraud the creditors of William T. Cuyler. The answer of the defendant, to the complaint, states that the plaintiff claims the property in question by virtue of a mortgage from Stephen P. Slocum, and that Slocum claims the same by purchase from George M. Cuyler and William B. Wooster, the assignees of William T. Cuyler; and it then alleges that the assignment was made for the purpose of hindering, delaying and defrauding his creditors, and for no other purpose, and that the same was therefore void. I think it should be assumed from the course of the trial at the circuit, and of the arguments of counsel on this motion, that Slocum did derive his title by purchase from the assignees of William T. Cuyler, and that such purchase was before the levy by the defendant by virtue of the execution in his hands.

In my opinion the rulings at the circuit admitting evidence of the declarations of William T. Cuyler and the other persons mentioned were erroneous. There was nothing proved, before this evidence was admitted, showing a combined common purpose of any persons with the plaintiff to hinder, delay or defraud the creditors of William T. Cuyler. If the assignment was made with a view to defraud the creditors of the assignor, it was void and inoperative as to such creditors. Assuming it was valid by its terms, but void for the reason mentioned, I incline to the opinion that any transfers of the assigned property by the assignees before the lien of the creditor attached, to *bona fide* purchasers for value and who

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were not chargeable with notice of the fraud, would be good and effectual. For the purpose of the question under consideration, it is proper to assume that the sale of the property in question, by the assignees, to Slocum, was a legal sale, and vested the title in Slocum. This must be assumed, because there is no evidence to the contrary. The fact that he derives his title from the assignees is itself assumed, as before stated, and there is an entire absence of evidence either of any agency, knowledge or participation of the defendant in the assignment which is alleged to be fraudulent, or of his participation in any of the subsequent transactions which are now alleged to be *indicia* of fraud in the assignment, which by any reasonable interpretation can be made to implicate him in a fraudulent intent.

Before evidence of the acts and declarations of persons not parties to the action can be properly received in evidence, in cases of this character, the common unlawful design should be clearly proved, as a condition precedent to receiving evidence of such acts and declarations at all. Evidence which is merely admissible on the question of the common illegal purpose, is not sufficient. On the trial of almost every issue of fact, evidence is admissible which, taken by itself, falls entirely short of establishing the fact to be proved, but which, taken in connection with other competent evidence, which is equally insufficient of itself to establish the fact in question, satisfactorily establishes the fact to be proved. The most that can be said in support of the evidence given with a view to establish the fact either that there was an unlawful compact for the purpose mentioned, or the connection of the plaintiff with it, if one existed, is that such evidence was competent upon the question, but insufficient to establish the fact.

The common purpose, as before remarked, must be clearly proved. Evidence which might be sufficient to submit to a jury on a question proper to be submitted to them, will not answer the requirement. It should be so strong as to make

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it their imperative duty to find in the affirmative, if the question were to be submitted to them, and where the court would set their verdict aside in case they did not so find.

But this was not a question with which the jury had any thing to do. It should be confined exclusively to the court. The judge merely held that there was evidence tending to show a common intent or purpose, which would be among the questions for the jury. He nowhere says that the fact was proved to his satisfaction, or, in the language of some of the authorities, that it was clearly proved. It is of the utmost importance that this view be strictly adhered to, in order to prevent great injustice; otherwise parties will be liable to have their rights determined upon the unsworn declarations and the irresponsible acts of others with whom they have had in fact no connection; as I think is strikingly illustrated by the present case, should the verdict be permitted to stand. The case, in principle, is very much like the case of an objection to the competency of a witness on the ground of interest in the result, before the code took away that objection. In such case the court, and not the jury, was to be the exclusive judge of the competency of the witness. The objection generally depended upon evidence of witnesses, including the witness challenged, which was always addressed to, and determined by, the court. (*Harris v. Wilson*, 7 *Wend.* 57.) The case does not give the charge of the court to the jury, but it shows that the evidence objected to was received on the ground that it tended to show the common intent and purpose, which would be submitted to the jury; and the presumption is that it was so submitted.

In *Harris v. Wilson*, (*supra*), it was held that evidence received by a judge on the trial of a cause, as *preliminary* to the introduction of other evidence, is not to be submitted to the jury; that it is the province of the judge, and not of the jury, to pass upon its sufficiency. Accordingly, where proof of the admissions of an alleged partner was offered, it

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was held the province of the judge, and not of the jury, to pass upon the fact whether he was such partner or not.

It is impossible, it seems to me, to distinguish this case, in principle, from the one before us, in regard to the question under consideration.

I am aware that there are some authorities in favor of submitting the question of the common intent to the jury, but I have met with none which is binding authority upon this court; and a sense of the great danger of such a practice has induced me to overrule or disregard them.

For the foregoing reasons I am of the opinion that a new trial should be granted, with costs to abide the event.

[MONROE GENERAL TERM, March 2, 1863. *Johnson, Welles and Davis, Justices.*]

WILLIAM IRISH, executor, &c., *vs.* GEORGE HUESTED and others.

A testator, by the third clause of his will, ordered and empowered his executors to sell all the rest of his real estate whatsoever, &c., and declared that all his real estate, except &c., should be considered as absolutely converted into personal estate from the time of his decease, and should be sold and converted into money, for the sake of a more easy division among those thereafter named; and that when so sold and converted into money, it should, together with the residue of his personal property, be disposed of, held, divided and distributed as thereafter mentioned. By the 6th clause all his real estate, except &c., was devised to his two daughters, H. and S. each one quarter, one quarter to the children of a deceased daughter, L., and one quarter to the children of R., another deceased daughter; subject to the power of sale and to the possession and control of the executors until sold, and to be treated as personal property from the time of the testator's decease, and not subject to partition or division until sold and converted into money.

Held that the real estate was by the will converted into personalty from the death of the testator.

And that, considered as personalty, the share of one of the daughters, who was a married woman, would be and remain her sole and separate prop-

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erty, not subject to her husband's control during her life, and within her absolute power of disposal by will.

That if she did not see fit to dispose of it by will, the provisions of the revised statutes (3 R. S. 5th ed. 185, sec. 86) would attach to it upon her death, and thereby the husband would become the absolute owner of it.

The testator further directed, in the same will, that in case either of his daughters should die without lawful issue, the part or share of her so dying should go to her surviving sister, and the children of his already deceased daughters, to be divided among the latter *per stirpes* and not *per capita*; and if either or any of the children of the deceased daughters should die without lawful issue, the survivor or survivors should receive the share or shares of the deceased. *Held* that although there was a *manifest intent* clearly inferrible from the tenor of the will, that the real estate should go to the use of the testator's children and grandchildren, such interest could not be held to stand in lieu of a *limitation over* to the children of S., one of his daughters. after her death, if she should die leaving children.

THIS action was brought by the plaintiff as one of the executors of &c. of Samuel Ludington, deceased, for a construction of the last will and testament of his testator, and to obtain the direction of the court as to the disposition to be made of certain portions of the estate. The defendants were George Husted, one of the executors, and the widow and heirs of the deceased. The will contained the following among other provisions:

“*Third.* It is my will, and I hereby order and direct, authorize and empower my executors hereinafter named, and the survivor or survivors of them, to sell all the rest of my real estate, whatsoever and wheresoever the same may be situated, and whereof I may die seised, including the farm on which I now reside, together or in parcels, either at public auction or at private contract, and subject to such stipulations relating to the title or the payment of the purchase money, (part thereof may be allowed to remain on bond and mortgage of the estate sold for any reasonable time,) or to any other matters connected with the sale, as my said executors shall judge expedient, or as their counsel shall advise; which sale or sales of such real estate shall be made as soon as conveniently may be after my decease, consistently with a fair

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price being obtained on such sale or sales. And I also authorize and empower my said executors to execute such instruments and assurances as shall be requisite for completing the sale of my said real estate or any part thereof as aforesaid ; and until such sale of my said real estate, it is my will, and I hereby direct and authorize my said executors and the survivor or survivors of them to take charge of, manage and rent the same, and to take and receive the rents, issues and profits thereof. And I further direct that my said executors shall also sell all my personal property which is not herein specifically disposed of, as soon after my decease as conveniently may be, and convert the same into money. And I further declare that all my real estate, except that which I have hereinabove devised to my said son Myron, shall be considered as absolutely converted into personal estate from the time of my decease, and shall be sold as aforesaid and converted into money, for the sake of a more easy division among those hereinafter named ; and when so sold and converted into money, shall, together with the residue of my personal property which may remain after paying my debts, funeral expenses, and meeting the provisions hereinbefore made in favor of my said wife, and the legacy to my said son Myron, and such legacies as may be hereinafter specified, and such provisions as may be made herein, and together also with what may have accrued and come to the hands of my said executors from the rents, issues and profits of my real estate as aforesaid, or from any other source, be disposed of, held, divided and distributed as hereinafter mentioned, by my said executors.

Sixth. I give and devise all my real estate, except that hereinbefore devised to my son Myron, to my two daughters, Harriet, wife of William Irish, and Sarah, wife of George Husted, each one quarter thereof; and to Matthew Van Allen and Sarah Van Allen, children of my deceased daughter Lydia, one quarter, subject to the deduction of two hundred dollars as above charged to and to be deducted from the share of the

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said Sarah Van Allen; and to the children of my daughter Ruth Ann, late the wife of Noah Lake, and now deceased, the other quarter, subject, however, to the power of sale aforesaid and the possession and control of the executors until sold, and to be treated as personal property from the time of my decease, and not subject to partition or division among them (except such rents and profits thereof as may come into the hands of my executors) until the said real estate shall be sold and converted into money as above provided.

Seventh. All the rest and residue of my personal estate not hereinbefore specifically disposed of, (after payment of my debts, funeral expenses, expenses of my executors, and providing for the trust funds as aforesaid,) including the money which my said executors shall receive for my real estate on its sale as provided, I divide into four equal shares, and bequeath the same as follows: To my said daughters, Harriet and Sarah, each one quarter, and to my said grandchildren, the children of my deceased daughter Ruth Ann, one quarter, to be equally divided between them; and to the said children of my deceased daughter Lydia the other quarter, to be equally divided between them, and subject to an advancement of two hundred dollars as aforesaid, to be deducted from the share of the said Sarah Van Allen. And I further provide that in case either of my said daughters shall die without lawful issue, then I give and bequeath the part or share of her so dying to her surviving sister and the children of my deceased daughters, to be divided among the latter per stirpes and not per capita; and if either or any of the children of my said deceased daughters shall die without lawful issue, the survivor or survivors in each case shall receive the share or shares of the deceased."

The complaint alleged that the defendant George Husted had been requested to join in the action, and had refused; that the testator died Feb. 6, 1861, leaving him surviving Lydia Ludington his widow, Oliver Ludington, Sarah Husted, wife of the defendant George Husted, Harriet Irish,

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wife of the plaintiff, and Myron W. Ludington, his children, and several grandchildren, his only next of kin and heirs at law. On the 28th of Nov. 1861, Mrs. Husted died intestate, leaving children, and on the 9th of Dec. 1861, Oliver Ludington died. The real estate of the testator referred to in the 3d and 6th items of the will has not yet been sold or converted into money, but is still worked and managed by said executors. The personal estate is undistributed. Said real estate is worth \$23,000; the personal \$10,000. The executors are desirous of closing the estate, and conflicting claims arise between the defendant George Husted, as surviving husband of the testator's deceased daughter Sarah, and the infant defendants, Charles and John Husted, as heirs at law and next of kin of said Sarah. The question to be settled in this action was, who is entitled to the share of said Sarah in the estate of her father, the said testator?

The cause was tried at the Columbia circuit, held in September, 1862, Hon. THEODORE MILLER presiding, and a verdict in favor of plaintiff—establishing and deciding that the infant defendants, Charles and John Husted, are entitled to the whole estate and interest in the real and personal property of the said Samuel Ludington, deceased, mentioned and described in the complaint, that their mother, Sarah Husted, the wife of the defendant George Husted, (were she living,) would now be entitled to, by virtue of the last will and testament of said Ludington—was by direction of the court duly ordered and entered, subject, however, to the opinion of the court at a general term. The case now came before the court, upon application for judgment upon said verdict, in accordance with the provisions thereof.

Gaul & Esselstyn, for the plaintiff and infant defendants.

A. Bingham, for defendant George Husted.

D. B. Beach, for other defendants.

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By the Court, GOULD, J. Although the testator, (Samuel Ludington,) in the 6th clause of his will, devises the mere naked legal title of his real estate to his two daughters and his grandchildren, yet even in that clause he stamps it with the character of *personalty*, in terms as explicit as those he had previously used in regard to the same property. Those terms are too positive and broad for this court to put them aside, and consider the bequests of the several quarters of the proceeds of the sale of his real estate as realty.

Considered as *personalty* from the death of the testator, Mrs. Husted's one quarter, by sec. 1 of chap. 90 of laws of 1860, (*Laws 1860, p. 157,*) must "be and remain her sole and separate property," not subject to her husband's control during her life, and within her absolute power of disposal by will. Still, if she did not see fit to dispose of it by will, (there being no intervening trustee, and no trust to be executed, and as she died leaving children, no limitation over) the revised statutes (*3d vol. 5th ed., p. 185, § 86*) would attach to it upon her death, and thereby the husband would become the absolute owner of it; that section providing that the "personal estates of married women" are to be "demanded, recovered and enjoyed" by their husbands, "as they are entitled by the rules of the common law." And this section is but a different form of enacting the former law of this state, (*see 1 R. L. 314, § 17,*) under which it has always been held that a married woman's personal estate, upon her death, ("intestate" in the R. L., i. e. when she had the power to make, but did not make, a will,) becomes the husband's.

It is claimed, however, that the *manifest intent* of the testator that this property should go to the use of his children and grandchildren, shall be held to stand in lieu of a *limitation over* to Mrs. Husted's children after her death, if she died leaving children. And this intent, it is claimed, is a necessary implication, from the fact that the will provides that in case either Mrs. Husted or Mrs. Irish should die

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leaving no lawful issue, her share should go to her surviving sister and the children of the two already deceased daughters of the testator, to the exclusion of her husband.

Such intent certainly seems clearly inferrible from the tenor of the will; but for courts to attempt to *make complete*, by inserted provisions, an instrument which the testator has left incomplete, seems a dangerous assumption of power; and it is in this case probably better to submit to the consequences of the omission, and allow the mother's property to be diverted from the children, than to establish a precedent so liable to perversion.

As to Mrs. Husted's children's share of the property left in trust for Oliver Ludington and the widow, Mrs. Husted has no right thereto, since they take directly from the testator the share which their mother would have had had she survived those parties. But they do not take *through* their mother—she never having had any interest in those funds.

Judgment should be entered in accordance with these views.

[ALBANY GENERAL TERM, March 3, 1863. *Gould, Hogeboom and Miller, Justices.*]

JOHN S. DYGERT vs. CATHERINE REMERSCHNEIDER
and others.

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Where a marriage settlement, in itself, provides for the payment of all existing debts, and such debts are actually paid, in pursuance of it, it is not fraudulent in law.

In such a case, as to all subsequent creditors, such a settlement is not presumptively fraudulent in fact.

Where, by a parol ante-nuptial agreement, the intended husband agreed on his part to convey certain real estate to his intended wife, and she in consideration thereof agreed to marry him, and pay his existing debts, and after the marriage the husband conveyed the land to E. for the benefit of the wife, and she paid her husband's debts, out of her individual earnings

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and separate estate; *Held* that this was a contract of purchase, as to the real estate, and was not a voluntary settlement.

Held, also, that although the payment of the larger proportion of her husband's debts was made from the wife's earnings after marriage, which in law would otherwise have been her husband's means, yet that her right to it was an equitable right under the executory contract made before marriage, and was based upon a good consideration proceeding from her, to wit, that of marriage and the advance of her separate estate.

Held, further, that the agreement on the part of the husband that his wife's future earnings should be applied to the payment of his own then existing debts, was not fraudulent as against his subsequent creditors.

That the stipulations of the ante-nuptial agreement on the part of the wife having been fully performed by her after marriage, she was entitled to have the agreement specifically performed, as against her husband.

That the husband having subsequently executed the agreement, by causing the land to be conveyed to his wife, in pursuance of its terms, she held the land by a superior claim of equity to her husband's subsequent creditors; and her equity related back to the time when the conveyance ought to have been made by the terms of the agreement.

That whether the agreement, when executed, was to be regarded as a voluntary settlement or a purchase, the right of the wife was in equity to be preferred to the claim of a subsequent judgment creditor of the husband.

THIS case is upon a complaint in equity, to set aside several conveyances as fraudulent. George Remerschneider, on the 3d June, 1861, conveyed two certain lots of land in Canajoharie, Montgomery county, to the defendant John Eigler, who, on the same day, conveyed the same lands to the defendant Catherine Remerschneider, who was the sister of Eigler, and the wife of George Remerschneider. The defendant Catherine subsequently conveyed one of the lots to the defendant Satz, and took back a mortgage for the consideration money. The plaintiff is a judgment creditor of George Remerschneider. An execution had been issued upon his judgment and returned by the sheriff of Montgomery county unsatisfied. The plaintiff asks, by his complaint, to set aside these several conveyances as fraudulent against him. A referee had been appointed to take and report the testimony, and the case came before the court upon the evidence so reported. The plaintiff's debt arose upon a promissory note, executed by a firm, "Pain & Blier," and the defend-

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ant George Remerschneider was a surety upon the note, which was dated October 3d, 1860. The plaintiff's action was commenced May 28th, 1861, and judgment was perfected 25th January, 1862. All the other facts sufficiently appear in the opinion.

P. Wetmore and George Smith, for the plaintiff.

Hees & Dunkle, for the defendants.

POTTER, J. Starting with the plaintiff's case unexplained by the defense, the facts that the defendant George Remerschneider was at the date of the deeds in question liable for the plaintiff's demand as a just debt ; that he was then the owner of real estate of sufficient value to satisfy such debt ; that five days after the commencement of the action on the note he conveyed the said lands with the intent to vest the title in his wife ; and that he still occupies and enjoys a portion of the said property with his wife ; were sufficient, prima facie, for the plaintiff to rest his case upon. These facts cast upon the transaction the legal presumption of fraud, entitling him to the relief claimed. A defense, however, was set up by the defendant Catherine Remerschneider, that the transaction of the conveyances was bona fide, and made upon good consideration. The evidence by the referee's report, establishes the following state of facts : In October, 1854, the defendant George Remerschneider was a widower, residing at Canajoharie, about 52 or 53 years of age, owning the real estate in question, in two parcels, which was then worth about \$700. He was in debt about the amount of the value of this real estate ; he had very little personal estate ; had two or three daughters then grown up ; was addicted somewhat to drink ; was by trade a mason, working when he could get jobs, and earning about \$100 a year ; he was embarrassed with his debts ; some of them were in judgment, and constables about that time were advertising his

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personal property on execution. The defendant Catherine, then Catherine Eigler, was a single woman, a tailoress, about the age of 24, about two and a half years from Germany ; had worked in the city of New York at her trade, and for a few weeks had been so at work at Canajoharie. George Remerschneider was there introduced to her and offered her marriage. After some negotiations on the subject, and also on the subject of his pecuniary condition, in which he informed her his debts were between \$600 and \$700 ; a parol ante-nuptial contract was made between them, in substance as follows : George Remerschneider on his part was to convey to her the said real estate ; Catherine on her part was to marry him and pay his debts. In consideration of this agreement the marriage was consummated. The details of the agreement, in relation to the time when the lands were to be conveyed on his part, the time within which the debts were to be paid on her part, and the source from which they were to be paid, was left, either without definite agreement between them, or is without explanation by evidence ; except, it does appear, that in the negotiation Catherine said she had some money that she brought from Germany, and that some more was expected, (neither of which amounts were stated,) but this money was to be applied by her to the payment of his debts. She did, subsequently, pay all the debts which her husband then owed, exceeding in amount \$700, and which sum was above the sum stated by him at the time of the agreement. These debts were paid by her from the following sources : When she married him, she had \$25 of money she brought from Germany. This, with \$70.28 from her earnings in that year, (whether these earnings were all before her marriage, which was in October, does not appear,) and \$55.98 which she subsequently received from Germany, was applied to the payment of his debts. The remainder of his debts, exceeding \$550, it is clear, was earned by her by work at her trade after her marriage. In the absence of evidence of her agreement to pay all his debts from her individual means, or

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to any extent further than such means existed ; and the fact that does appear, that she kept her own book account of her earnings, which when collected by her she applied from time to time, by his consent, to the payment of his debts, it was a fair inference, and I so found the fact to be, that in their agreement before marriage, it was understood that she was to apply all the money she received from Germany towards the discharge of his debts, and that she did so apply it. And I also found it to be a part of the said agreement, that the remainder of his then existing debts were to be paid by her from her earnings at her trade as a tailoress after marriage, and that she fully performed this part of the agreement on her part. The evidence also establishes that George Remerschneider after marriage was frequently requested to convey the said lands to her ; that he frequently promised so to do, but omitted to convey them until after the plaintiff's action was commenced. The plaintiff's debt was not incurred by George Remerschneider until about six years after this marriage.

It is now claimed by the plaintiff that a settlement after marriage, in pursuance of a parol ante-nuptial agreement, is void ; and that the earnings of the wife after her marriage belong to her husband, and are a fund liable to the payment of his debts. Both these propositions, in the abstract, are probably sound. By the statute of frauds, all parol agreements relating to the sale or conveyance of lands are void. Ante-nuptial agreements were not an exception to the rule, before the statute of 1849, (*chap.* 375, *p.* 529, § 3,) which provides as follows : "All contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place." It is not necessary, in the view I have taken of this case, to decide whether this statute in any degree abrogates the statute of frauds so far as it relates to marriage contracts. It is doubtless a well established rule in equity, and at law, that a settlement after marriage, in pursuance of a parol agreement entered into be-

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fore marriage, was not valid as against creditors. (*Reade v Livingston*, 3 *John. Ch.* 481.) The same authority, however, lays down the rule, that a settlement made after marriage in pursuance of a *valid* or of a written agreement before marriage is good. As the agreement before us was not in writing it must be otherwise shown to be *valid*, in contemplation of law or equity, or the defense must fail, as against creditors. It was held in *Dunham v. Taylor*, (29 *Geo. Rep.* 166,) that marriage is such a part performance of the ante-nuptial contract as to take it out of the statute of frauds of that state. And it cannot be doubted that there may be parol contracts in regard to the conveyance of lands, in this state, with part or partial performance, that the courts would enforce between the parties on a complaint for specific performance. Unless, therefore, the defendants bring this case within some exception, the rule is doubtless as claimed by the plaintiff. So it was held in *Beaumont v. Thorpe*, (1 *Vesey*, 27,) and in various more recent cases, that a *voluntary* settlement made after marriage by a person indebted at the time, is fraudulent and void against creditors. The presumption of law in such case is, that it is fraudulent and void against all debts *then* existing, without regard to their amount, or the extent of the property, or the circumstances of the party; though this has been much questioned in England. None of the cases go to the length, however, in regard to subsequent debts, of excluding explanation of the transaction, or of preventing the showing of good faith, or a good consideration. In regard to such debts, we are not to hold a deed fraudulent merely because it is voluntary. In such case, before we can pronounce it fraudulent, we must decide, as matter of fact, that there was a fraudulent intent in making the conveyance. In a case, therefore, where every creditor of the grantor was by the agreement to be paid, and was subsequently paid, in pursuance of the agreement, there would seem to arise no presumption of fraud; and in the absence

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of other facts, the agreement would be valid. (*Frazer v Western*, 1 Barb. Ch. R. 220.)

In regard to subsequent creditors, in cases of voluntary settlement, as I understand the rule, they stand in no superior condition, in equity, to that of the person upon whom the settlement is made, when the settlement is not impeached for want of good faith. It is an old maxim, that where the *rights* of parties are equal, the claim of the party in possession shall prevail. So, too, where the *equities* are equal, he has the better title who is first in point of time. (*Co. Lit.* 14, a.) If there has been a prior *valid* agreement, it has the superior right over subsequent creditors. What I mean here by a valid agreement, as distinguished from a voluntary agreement, is one that may be regarded as a purchase where a consideration has been paid. Is this such an agreement? Almost identical with the case before us, is *Brown v. Jones and others*, reported 1 Atkyn's R. 188, 190. It differs only in that of assignees in bankruptcy, instead of a judgment creditor. That was a marriage settlement, made ten years after marriage. The consideration was, £1000 agreed to be advanced. £600 only had been advanced by the brother of the wife; the remaining £400 had never been paid. Brown, the assignee in bankruptcy, claimed that the agreement to advance had never been fully performed. Lord Hardwicke said, "the case has been made out to my satisfaction. Though the court will favor creditors as much as they can, it must be where they have superior right over other persons." "It is admitted, (says he,) that if a settlement is made before marriage, though without a portion, it would be good, for marriage itself is a consideration, and it is equally good if made after marriage, *provided it be upon payment of money* as a portion, or a new and additional sum of money; *or even an agreement to pay money*, if the money be afterwards paid in pursuance of the agreement. This, (says he,) is allowed both in law and in equity to be sufficient to make it a good and valuable settlement." In

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the case of *Scott v. Ball*, (2 *Lev.* 70,) the question raised was, whether the sum paid was a fair equivalent for the amount of the estate settled. Lord Ch. J. Hale said, "The court, in family agreements, does not nicely estimate the value of estates, but only whether it is a fair, honest agreement." In the case of *Wheeler v. Caryl*, (*Ambler's R.* 121,) the question was whether the settlement was *voluntary* and fraudulent against creditors; or for a valuable consideration, and good. The lord chancellor said, "This is clear; if after marriage a father, brother or other person, advance a sum of money in consideration of the husband's making a settlement, such settlement will be good and for a valuable consideration."

In *Lush v. Wilkinson*, (5 *Vesey*, 387,) the rule was laid down, that whether a voluntary settlement was good or not, depended upon whether the person making it was solvent; and in *Kidney v. Coussmaker*, (12 *Vesey*, 136,) it was held that a settlement after marriage was fraudulent *only* against persons that were creditors at the time. This, I think, has been followed as the rule ever since. In *Reade v. Livingston*, (*supra*,) Chancellor Kent assents to this rule, with this very just modification, "that subsequent creditors may impeach the settlement for fraud, if they can show *antecedent* debts sufficient in amount to afford reasonable evidence of a fraudulent intent. In *Pinkston v. McLemore*, (31 *Ala. Rep.* 308.) it was held, that "a contract between husband and wife by which a separate estate was created in the wife in the earnings of herself and her domestic servants, was void as to *existing creditors* of the husband, but *valid as to his subsequent creditors*, unless assailable for intentional fraud." And in *Reynolds v. Sanford*, (16 *Texas Rep.* 286,) it was held "that a husband may settle his property on his wife and family when he may do so without impairing the rights of *existing creditors*."

And in a more recent case in our own state, (*Simmons v. McElwain*, 26 *Barb.* 419,) the court, in the third district,

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held "that although a deed from a husband to his wife (directly) is void in law, yet such a grant will be upheld in equity when it is necessary to prevent injustice. And where a wife, in good faith and for a valuable consideration, paid out of her separate estate, has purchased land which is conveyed to her by her husband, she obtains an equitable right to it, which a court of equity will recognize and protect. The contract in this case was made after the taking effect of the acts of 1848 and 1849, in relation to the estates of married women. The individual estate of Catherine Remerschneider which would have remained her separate estate, was a part of the purchase money of this estate. This, together with marriage, was a consideration actually paid by her for the lands in question, and which, as the facts are found, was all that she was to pay therefor. Her subsequent earnings, it may be assumed, her husband, if he did not grant in the ante-nuptial contract, waived or released his right to, and this was no fraud against subsequent creditors. Since the acts of 1848 and 1849, the advance of her own money, in performance of such an agreement, is of the same effect as if it was the money of any other person, and creates a good legal and equitable purchase.

I think we can deduce from the cases above cited, as applicable to this, the following propositions:

1st. Where a marriage settlement in itself provides for the payment of all existing debts, and such debts are actually paid in pursuance of it, it is not fraudulent in law.

2d. In such case, as to all subsequent creditors, such settlement is not presumptively fraudulent in fact.

3d. In this case, the agreement and promise of the defendant Catherine Remerschneider to pay the debts of her future husband, and the subsequent appropriation thereto of her individual and separate estate, was a contract of purchase, and not a voluntary settlement.

4th. Though the payment of the larger proportion of her husband's debts was from her earnings after marriage, which

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in law would otherwise have been her husband's means, yet her right to it was an equitable right under the executory contract made before marriage, and was based upon a good consideration proceeding from her, to wit, that of marriage, and the advance of her separate estate.

5th. That the agreement on the part of George Remerschneider that his wife's future earnings should be applied to the payment of his own then existing debts, is not fraudulent towards his subsequent creditors.

6th. The consideration of the ante-nuptial agreement, on the part of Catherine, having been fully performed and consummated by her, after marriage, entitled her to have the agreement specifically performed as against her husband.

7th. George Remerschneider, subsequently, in pursuance of the agreement on his part, having executed it, by causing the lands to be conveyed to his wife, she holds the lands by a superior claim of equity to her husband's subsequent creditors, and her equity relates back to the time when the conveyance ought to have been made, by the terms of the agreement.

8th. Whether the agreement, when executed, is to be regarded as a voluntary settlement, or a purchase, the right of the defendant Catherine is in equity to be preferred to the claim of the plaintiff who is a subsequent judgment creditor.

There was one other question of fact raised in the case, which is entitled to notice. There was some evidence that \$75 in money had been loaned by George Remerschneider to one Timmerman, upon a note payable to the former, and that after the plaintiff's action was commenced the note was changed, and a new note given and made payable to the wife. This fact was also explained by the uncontradicted testimony of the defendants. Both George and Catherine Remerschneider testify that the money was Catherine's; that it was loaned by her personally. That Timmerman, the borrower, drew the note and delivered it to her; that she could not read writing; that without her knowledge it was made

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payable to her husband; that she did not know of the error until afterwards informed of it; and when so informed she immediately had it corrected. The plaintiff did not offer evidence to show from what source the money came. She testified that a part of it was given to her by her brother, and the remainder she earned. She does not state when; but says none of it was her husband's, and this evidence, without explanation, is satisfactory. The onus was on the plaintiff. This evidence fails to prove that her husband was the owner.

The plaintiff's complaint must therefore be dismissed, with costs.

[SCHENECTADY SPECIAL TERM, March 3, 1863. *Potter*, Justice.]

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The act of congress, passed February 25, 1862, authorizing the issue of treasury notes, to the amount of \$150,000,000, and declaring that such notes "shall be lawful money and a legal tender in payment of all debts, public and private," &c., is a constitutional and valid law.

Congress has the power to authorize the issue of treasury notes, to circulate as money. And it can make such notes a legal tender.

THIS was a controversy submitted to the court by the parties, under section 372 of the code of procedure. The facts agreed upon are these: The defendant is a banker, in the city of Rochester, and as such was indebted to the plaintiff in the sum of \$130, for so much lawful money of the United States, deposited with him prior to February, 1862, payable upon demand. The plaintiff heretofore and since the 25th day of February, 1862, duly demanded of the defendant payment of said debt. The defendant then and there tendered to the plaintiff thirteen certain United States treasury notes, known as "legal tender notes," of uniform

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description, for \$10 each, in payment of said demand. The plaintiff refused to receive said notes, upon the ground that the act of congress of February 25th, 1862, under which the notes were issued and declared a legal tender, is not warranted by the constitution, and insisted on being paid in gold or silver coin; and the defendant refused to pay otherwise than in such notes, claiming that the same were lawful money of the United States, or a legal tender. At the time of such demand and tender, the notes aforesaid would purchase in the markets of this state \$87 of gold or silver coin of the United States, and no more; which relative market rates have been and are fluctuating from day to day. Since the spring of 1861, the government of the United States have been continuously waging a war, of hitherto unexampled magnitude, for the suppression of a powerful rebellion, and have been compelled in so doing to make expenditures amounting to over \$1,000,000,000. The whole controversy between the parties was whether such notes are or are not lawful money or a legal tender.

E. Peshine Smith and T. C. Montgomery, for the plaintiff. The act of congress of February 25, 1862, declaring the notes in question "lawful money and a legal tender," is unconstitutional and void. The congress of the United States has only such powers as are expressly given by the constitution, or are "necessary and proper" for carrying such powers into execution. All other powers are distinctly reserved to the states or people, and are thus expressly withheld. (*U. S. Const. art. 1, § 1; § 8, sub. 17. Amend. art. 10.*) In this respect congress is wholly unlike our state legislature, which has all power not expressly prohibited by constitutional provisions. (*People v. Draper*, 15 *N. Y. Rep.* 532, 543. *Westervelt v. Gregg*, 12 *id.* 212, *per Denio, J.*) The only provisions of the U. S. constitution which can bear, directly or remotely, on this question, are these: The congress shall have power: 1. To lay and collect taxes, duties, imposts and

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excises, to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States. 2. To borrow money on the credit of the United States. 3. To regulate commerce with foreign nations, and among the several states and with the Indian tribes. 5. To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures. 6. To provide for the punishment of counterfeiting the securities and current coin of the United States. 10. To declare war.

* * * 11. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years. 12. To provide and maintain a navy. 14. To provide for calling forth the militia, to execute the laws of the union, suppress insurrections and repel invasions. 15. To provide for organizing, arming and disciplining the militia,

* * * 17. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof. (*Art. 1, § 8.*) No capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken. (*Art. 1, § 9, sub. 4.*)

No state shall * * * coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. * * * (*Ext.*

from § 10, sub. 1, of art. 1.) It is remarkable that among the powers by this section prohibited to the states, are some which are also prohibited to congress, and others which, though not granted, are not in terms prohibited to congress. (*See sub. 3, § 9, art. 1, &c.*) This constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby,

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any thing in the constitution or laws of any state to the contrary notwithstanding. (*Art. 6, sub. 2.*) No person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation. (*Ext. from Amend. art. 5.*) The numeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people. (*Amend. art. 9.*) The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. (*Amend. art. 10.*)

I. The power "to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures," does not embrace the power to make these *notes* either money or a legal tender. But it does expressly define what shall be *money*, and in so doing what shall be a *legal tender*; for lawful money is synonymous with a legal tender. This embraces the whole subject. The only power given to congress is to fabricate this money in the way expressly prescribed by the constitution—by coining—and to regulate its value. This being so, any further power by implication, or as necessary and proper to the execution of any other power, is excluded. The maxim *Expressio unius exclusio alterius* applies, in its fullest force. "Coin," popularly and derivatively, means a piece of *metal* stamped as money—primarily "the die employed for stamping money." "To coin," means "to stamp a *metal*, and convert it into money; to mint." (*Webster's Dict.*) All the other uses of the word are clearly metaphorical—as to coin words, to coin a lie, &c. "Coin—a piece of gold, silver, or other metal stamped by authority of the government, in order to determine its value, commonly called money." (*Bouv. Law Dict., citing Coke Lit. 207. Rutherf. Inst. 123.*) Money is well defined as "the common medium of exchange among civilized nations." (*Cyclop. Am.*) It must have intrinsic value. (*Id.*) That "coin" means metallic money, is apparent from the very act of con-

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gress now under examination. It repeatedly employs that word in contradistinction to these very notes, and to designate gold and silver currency. This provision of the constitution therefore clearly requires that the "money" which congress is to provide shall possess the following requisites, viz: It shall be of *metal*: it shall be *struck, stamped or coined*: it shall be of intrinsic value, and its value shall be regulated. To regulate the value, assumes that there is an existing value—not that the value is to be created. Money, in its nature, must have an intrinsic value or it cannot be the medium for the exchange of commodities. If congress were to coin a piece of iron of the size of a dime, and stamp it as a dollar, (as we concede it may constitutionally do,) the dollar would at once have only the value, in purchasing any commodity or for any other purpose, which the iron has of which it is made, if there were no pre-existing debts. It follows, of course, that if the dollar stamp were put upon a material of no appreciable value, the dollar would be worthless. The limitation, therefore, of the material to a thing of intrinsic value is one of substance and necessity, not of policy or choice. If this valueless dollar is made a legal tender, it is made to be equal to an ounce of silver, *only for the purpose of paying existing debts*; in other words, it simply *confiscates all debts*; and when by its operation all debts are canceled, the last holders find it to be like the magic golden apples, *ashes* only in their hands. But it is claimed that a *representative value* is sufficient, and that these notes have such a value. The argument destroys itself. A representative value represents what? Stamped coin. This \$10 note represents no value whatever until you have determined what a *dollar* is. To find that, we must find the *ounce of silver* which congress has coined and stamped as a dollar. It is apparent from the examination of this subject that the coined metal, with its value stamped thereon, and "weights and measures," (connected together in this constitutional provision,) are in the nature of things inseparably and essen-

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tially related to each other, and can refer only to things the value of which is measured by their intrinsic quality and quantity. It is for this reason that the denominations of money or coins and of weights have been in all countries identical or correlative—e. g., *pound*: as (ounce) the Roman dollar: *drachma*, the Greek drachm; *Livre*, the French pound, &c., &c. *Ounce* (the dollar) is the same word as *inch*, the 12th part. (*Webster's Dic.* See *R. S.* 607, § 8.) These notes, in their terms, recognize and necessarily assume the existence of a *money* which they *promise to pay*. The learned counsel opposed is compelled to argue that a promise to pay money is itself money. Clear as the language of the constitution is, this point is placed beyond all question by the fact that the convention, by a nearly unanimous vote, refused to insert in the constitution the power to issue any *paper currency*, a currency then described by the phrase "bills of credit." (*See next point.*)

II. The power claimed cannot be found, by any implication, in the authority "to borrow money on the credit of the U. S." This provision was originally reported, in the draft of the constitution, as it stood in the constitution of the old confederacy—with the words, "*and to emit bills,*" after "money." (*Madison Papers*, vol. 3, p. 1343. *Elliott's Debates*, vol. 5, pp. 434, 435.) These words were stricken out by a vote of nine states to two. That bills of credit meant paper currency, all cotemporaneous records and writings show. (*Story's Com.* 222. *Briscoe v. Bank of Kentucky*, 11 *Peters*, 313, 333. *Craig v. State of Missouri*, 4 *id.* 410. *Federalist*, No. 44. 2 *Elliott's Debates*, 83.) No argument is needed to prove that obligations given for borrowed money (as these notes are, if within *this power* of congress) cannot themselves be money. They are promises to pay money. But, it is said, they are capable of being a legal tender, and as this quality *may be* necessary to secure the vast sums of money required, the court must hold that this necessity exists, and that the act declaring them a legal tender, is the exer-

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cise of a power necessary to carrying into execution the power to borrow money. But we deny that any such necessity exists, because congress has *unlimited power* to raise money by taxation, even to the full value of the taxable property of the United States. No borrowing power can raise more. But the power assumed by this act of congress is not to *borrow* money. Borrowing involves the mutual *voluntary* concurrence of both parties, the lender as well as the borrower. And the act does not provide for "borrowing money" on these notes. They are issued for services or commodities, not money, and in their inception are sought to be *forced by law*, by the government upon a creditor in payment of his debt, and upon a soldier or a servant in payment for his services. This is not borrowing at all; much less borrowing *money*.

III. Nor can the power of taxation be invoked to sustain this act of congress. It neither imposes any tax, nor authorizes these notes as an anticipation of taxes to be raised. If it did, there would still be the insuperable objection that no *power* or *necessity* could exist for making them a legal tender, inasmuch as congress has the absolute power to raise money indefinitely, by taxation. Besides, the constitutional provisions requiring all capitation or other direct taxation to be in proportion to the census, and all other imposts to be uniform, expressly forbid this mode of taxation, if such it could be called.

IV. The power to regulate commerce among states does not and cannot apply to commerce within the limits of a state, between citizens thereof. To hold otherwise would be to sanction the regulation by congress of the internal traffic of this state on its canals.

V. The argument that this measure is necessary for carrying into execution the powers to raise and support armies, maintain a navy, and employ the militia in waging a war of unexampled magnitude, involving the expenditure of over \$1,000,000,000, is answered by the fact that congress has

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unlimited power to raise money by taxation, and this measure cannot therefore be necessary. But it is argued that this crisis did not admit of the delay involved in levying and collecting the necessary taxes; that the life itself of the government was in imminent peril, and this power was necessarily exerted in anticipation of means to be raised by taxation. Assuming that such an argument is admissible in discussing the constitutional power of congress, it suffices now to answer that this is *not* the power which congress asserts by this act in question. It does not anticipate taxes. If it did, however, and these notes were issued on that ground, they would be "bills of credit," the power to issue which the convention refused to insert in the constitution.

VI. The doctrine that congress can exercise all powers which in its opinion may be necessary for the "common defense and general welfare of the United States," entirely subverts and nullifies the whole constitution. If this doctrine be tenable, then the courts could never declare any act of congress unconstitutional. The words quoted occur in the clause delegating the taxing power, and indicate the object and the *limit* of taxation.

VII. If we are correct in the foregoing argument, there only remains to be met the bold and broad proposition, that in the gigantic struggle of a nation to prevent its own destruction, the carefully guarded written constitution must yield to the supreme law of self-preservation; that if the necessary powers for this purpose are not found in the instrument called the constitution, they do exist in the essential constitution and nature of every organized state; and that, as congress has deemed this measure necessary, the courts must sustain it as such. Can this be maintained as a judicial proposition? The question is one of startling proportions! An affirmative answer virtually declares that the government of the United States, while a war is waging which threatens its destruction, is limited in its constitutional powers only by the condition that any power it may exercise shall conduce

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to the subduing of its enemies. It is unnecessary to discuss this question. The constitution having conferred full express powers to raise, by borrowing and taxation, all needful money, there can be no necessity for resorting to the unusual and extraordinary measure of declaring these notes a legal tender.

Geo. F. Danforth, for the defendant. I. The debt due the plaintiff was neither "for duties on imports, nor interest on the public debt," and he had no right to refuse the notes tendered, for as to him they were "lawful money" and "a legal tender in payment" of his debt, (*Act of Congress, Feb. 25, 1862, authorizing the issue of U. S. notes*), as much so as the gold and silver coin which he coveted. 1. Congress has power under the constitution to create money, whether of metal or paper, and make the same a legal tender. The argument on the other side is, that nothing but gold or silver is a legal tender under the constitution. But the constitution does not *in terms* declare these metals to be a legal tender, nor does it *in terms* confer on congress the power to create a legal tender. Yet this power has always been exercised, and in this case is conceded by the plaintiff to exist, and to have been rightfully exercised. Congress has created a legal tender. (1.) Of gold coin, good for any sum whatever. (*Laws of U. S., 18th Jan. 1837, § 10.*) (2.) Of silver coin, good according to its denomination. *Silver dollars*, a good tender for any sum. Half dollars and smaller coin, half dimes inclusive, sufficient for debts not exceeding five dollars; while three cent pieces can discharge no obligation exceeding in amount thirty cents. (*Act of 21st February, 1853; 3d March, 1851, § 11.*) These coins are not pure gold or pure silver, but of various degrees of debasement, and variable at different times. It is evident that neither gold nor silver is effectual for the discharge of a debt, either *per se*, or because it is coined or made by government. The coins above named are not wholly gold

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or silver. Three cent pieces will not discharge a debt of five dollars, nor half dimes or half dollars a debt of ten dollars. And copper cents are not good for any sum. The value of all these coins, for the payment of debts, is derived from the act of congress declaring them a legal tender. Congress, then, could still further debase the metal, and the coin would still be a legal tender, for sums having no proportion or regard to their intrinsic value, for it is provided that "congress shall have power to coin money and *declare the value thereof.*" (3.) Congress has issued notes and created a third medium, which it declares to be a legal tender, except in certain specified cases. The constitution does not prohibit this; and so far as its express provisions are concerned, paper money issued by its authority may as well be declared a legal tender as coins of debased metal. 2. The constitution confers on congress the power now exercised of making such notes a legal tender. (§ 8.) It has the power *to borrow money on the credit of the United States*, with no limit as to method or means. To regulate commerce. To coin money without restriction as to material, whether of gold, silver, copper, iron, leather, (as once in England,) or paper. To raise and support armies. To provide and maintain a navy. If not conferred expressly, the power may be found in the authority conferred "to make all laws which shall be necessary or proper for carrying into execution the foregoing powers and all other powers vested by the constitution in the government of the United States."

II. But if found nowhere in the written constitution, the power may be found in the prerogative of government to do all things necessary for its preservation, and the act of congress is to be construed in view of the present peril of the government, without regard to those limits which might be applicable in times of peace and quiet.

Wm. F. Cogswell, also for the defendant. The question in this case is whether the provision of the act of congress to

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authorize the issue of United States notes, approved February 25, 1862, making such notes lawful money and a legal tender in payment of debts, is constitutional. The provision of the act in question is in the following words: "That the secretary of the treasury is hereby authorized to issue, on the credit of the United States, one hundred and fifty millions of dollars of United States notes, not bearing interest, payable to bearer at the treasury of the United States, and of such denominations as he may deem expedient, not less than five dollars each, provided that such notes herein authorized shall be receivable in payment of taxes, internal duties, debts, and demands of every kind due to the United States, except duties on imports, and of all claims and demands against the United States of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin, and *shall also be lawful money and a legal tender in payment of all debts, public and private*, within the United States, except duties on imports, and interest as aforesaid." I shall proceed at once to endeavor to show that congress has the power to adopt such a law. Before proceeding to consider the several provisions of the constitution bearing upon this question, it is proper to remark that the instrument which the court is called upon to construe, is not a statute providing the particulars and detail necessary for its own execution, but the constitution of the government of a sovereign state; the grant of power to the different departments of the government created thereby, necessary and proper to invest that government with all the powers of sovereignty embraced in the idea of the government of a sovereign state; a government designed and established to meet all the exigencies of the state which might arise in the future, however they may have been produced. Accordingly, the provisions of the constitution are every where conceived and expressed in a spirit of large comprehensiveness. In this light and temper we approach the consideration of the provisions of the constitution. I submit that the power to make the law in ques-

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tion is conferred upon congress by the 5th subdivision of article 8 of title 1 of the constitution, which provides that "Congress shall have power to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures." Money is defined to be the medium of exchange used by any people. (*New American Cyclop.*, vol. 11, 644, *article Money*. *Fox v. Howard*, 5 *Howard's U. S. Rep.* 410-433.) It has consisted of a very great variety of substances, and its only essential is that it shall be issued as money, be provided as the medium of exchange by the sovereign authority of the state, or when not so provided be so used by the common consent of the public. Its essence by no means consists in the substance of which it is composed, or in its inherent value. To coin is to make or fabricate for general use, (*Webster's Dict.*, word *Coin*.) The power to coin money therefore is the power to provide, create, constitute, the legal medium of exchange in the country. This provision of the constitution was intended to vest in congress this function of sovereignty, to be exercised according to the exigencies of the country and the varying wants of civilization. This argument is strengthened by the fact that the word money was in common use at the time of the formation of the constitution as applicable to paper, both in the legislation of congress under the confederation, and in popular parlance. The notes issued by the confederate congress were spoken of in such legislation and by the writers of the day as money—continental money. This argument is not weakened by the words to regulate the value thereof and of foreign coin. This does not mean to regulate the purchasing power of money, or its commercial value; that must be left to the laws of supply and demand—the laws of trade. It does mean to fix the denominational value according to the unit of money established in the United States; as to the money of the United States to establish the unit of money as the dollar, and to provide that any substance bearing a certain device or inscription should be a certain fractional part, or multiple

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of such unit. As to foreign money, that it should have a certain relative value to the money of this country; that the sovereign of England, the franc of France, or the thaler of the German states, should be equal to a certain fraction or multiple of the dollar so established as the unit.

Our adversaries are in error, I submit, in supposing that money, as such, must have an inherent value. It is only a sign of value. The substance of which it is composed may or may not have value, but as money it is only a representative of value. The gold of which an eagle is composed has an intrinsic value, but it is only as a commodity. It has no intrinsic value until it is diverted from the purposes of money and becomes a commodity. As money, it is a sign or representation of value for ten dollars. As a commodity, it may be worth more or it may be worth less. But its value as a commodity has nothing to do with its representative character as money.

Second. It is also conferred by the grant of power to borrow money on the credit of the United States, and to make all laws which shall be necessary and proper to carry into execution that power. (*Subdivisions 2 and 18 of § 8, art. 1.*) This power gives the right to invest the securities of the government with all incidents necessary and proper to secure the desired end. Congress may, for this purpose, fix a high rate of interest, clothe its securities with negotiable character, exempt them, or property in them, from taxation, or make them a medium of exchange or tender in payment of debts. Any thing and every thing necessary and proper to secure the borrowing of money, congress has the power to do, and every incident and quality necessary to make the security it puts into the market so desirable that it will accomplish that object it has the power to give it.

Third. It is also conferred by the grant of the power to raise and support armies, and to provide and maintain a navy. In time of war large armies cannot be raised without large expenditures of money—expenditures that cannot be met by the gold

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and silver money of the country. Congress must, therefore, either adopt the bank notes of the country as money, or use its own credit as such. It may do either—it may do both; but to deny to it the power of doing either, would be to deny the efficient exercise of the power to raise and support armies, and to provide and maintain a navy. The power of the government to use its credit as money, to make it a circulating medium and a tender in payment of debts, may be just as indispensable as the power to establish and carry on manufactures of arms and munitions of war, or ship yards for the construction of vessels.

Fourth. It is also conferred in the grant of power to regulate commerce, (*3d clause of § 8.*) The power to regulate commerce embraces the right to create and regulate all the means by which it can be carried on.

Fifth. It is also conferred by the grant of the power to levy and collect taxes, &c. The levying of taxes implies the provision of a medium by which they may be paid. But it will be said, of course, the government may provide how the dues to itself should be paid. Our adversaries do not deny that. But we must look deeper into the matter than this. Taxes must be paid, that the purposes of government may go forward—that its wants may be supplied. They must be paid in that which is the representation of value—the medium of exchange; in short, in money. If then, the medium of exchange—the money in use—at any time is found not sufficient, or not adapted to the new wants of the government in this respect, then another medium or other mediums of exchange must be adopted and sanctioned.

I have thus grouped together these several provisions, without stopping to enlarge upon them, that the whole subject might be before the mind of the court at once, and because what little I have to say further, will, at least most of it, be more applicable to all or either of the provisions than divided among them severally. We have, then, the great outlines of the powers of the government of a sovereign state, a

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government established prospectively to rule a nation numbering its inhabitants by hundreds of millions, over a territory embracing half a continent ; a government charged with the duty of providing for the defense and promoting the general welfare of such a state ; we have, in short, the foundations of a great empire. To this government is given, in a few brief and comprehensive sentences, plastic and self-adjusting to the progressive wants of such a state, power to raise and support armies, to provide and maintain navies, to borrow money upon its credit, to regulate commerce, provide the medium of exchange, to levy taxes, and to make all laws necessary to carry these into execution. To the execution of each of these powers, the power in question is, or may be, a necessary means. Armies cannot be raised, furnished and maintained, navies provided, commerce regulated, nor the credit of the government used, nor taxes levied, without money. This is the vitalizing force of all these powers, and these powers must draw within the provisions of the constitution that one subject without which these grants are but an empty name. The constitution provides for the end to be accomplished. It wisely leaves the means to be selected according to the exigencies of the case as it arises. The end being indicated, the means follow.

E. DARWIN SMITH, P. J. The question presented for our decision in this case is, whether the act of congress, passed February 25, 1862, authorizing the issue of treasury notes to the amount of \$150,000,000, and declaring that such notes "*shall be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest on bonds and notes of the United States,*" is a constitutional and valid law. The whole provision is as follows :

"That the secretary of the treasury is hereby authorized to issue, on the credit of the United States, one hundred and fifty millions of dollars of United States notes, not bearing

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interest, payable to bearer at the treasury of the United States, and of such denominations as he may deem expedient, not less than five dollars each ; provided, that such notes herein authorized shall be receivable in payment of taxes, interest, duties, debts and demands of every kind due to the United States, except duties on imports, and of all claims and demands against the United States of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin, and shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest, as aforesaid."

The case states that the defendant was indebted to the plaintiff in the sum of \$130, for money deposited with him prior to February, 1862, and the plaintiff demanded payment of such debt. That the plaintiff tendered to him thirteen so-called legal tender notes, of uniform description, for ten dollars each, in payment of such deposit, which was refused, upon the ground that the said act of congress under which the notes are issued and declared a legal tender, is not warranted by the constitution, and insisted upon being paid in gold or silver coin ; "and that the defendant refused to pay otherwise than in such notes, claiming that the same were lawful money of the United States, or a legal tender."

It is impossible for us to approach the examination and discussion of the questions arising upon this submission without a deep sense of their great magnitude, and of the very serious interests and consequences, public and private, involved in their ultimate decision.¹ Perhaps in no single action questions of equal, certainly none of greater, importance, were ever submitted to a judicial tribunal in this or any other country.

It is, however, a source of some gratification and relief to us that the responsibility for their final decision will devolve upon others, and that we shall probably do nothing more

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than contribute something to the discussion which they will be likely to undergo in their progress to the tribunal constituted for the final determination of all questions arising under the constitution of the United States.

We are called upon to declare the act of congress of February 25, 1862, above mentioned, unconstitutional. The consideration of this question requires us to give a construction to the constitution of the United States, or to several of its provisions.

Under our system of government, it is the province and duty of the judiciary, when properly called upon so to do, to bring all acts of congress and of the state legislatures to the test of the constitution, and to declare all laws invalid which are *clearly* and *palpably* in conflict with the fundamental law. But the presumption is in favor of the validity of all acts of the legislature, whether state or national, and the courts should only declare acts unconstitutional when they are clearly so, beyond all reasonable doubt. This is the settled rule. (*Fletcher v. Peck*, 6 *Cranch*. 128. *Ogden v. Saunders*, 12 *Wheat*. 29. 24 *Barb*. 446. 14 *Mass. R.* 345.)

The chief questions for examination resolve themselves into two leading points of inquiry :

1st. Has congress the power to authorize the issue of treasury notes to circulate as money ?

2d. If such power exists in Congress, can it make such treasury notes lawful money, and a legal tender in payment of public and private debts ?

Before proceeding to the discussion of these questions, it is important to determine the principles of interpretation which should be applied in the construction of the constitution of the United States. That constitution was framed and designed for the establishment of a NATIONAL GOVERNMENT. The confederacy of the revolution, after four or five years of peace, had proved a failure. It was found entirely inadequate for the purpose for which it was formed, when the pressure of war was withdrawn from the colonies, and the

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people turned their attention to the arts of peace, and began to develop the enterprise and resources of the country. The convention which met in Philadelphia in 1787, to revise the articles of confederation, were deeply impressed with a sense of their utter insufficiency, and after some discussion, exhibiting their defects, as its first deliberate act, after its organization, resolved, "that a national government ought to be established consisting of a SUPREME LEGISLATIVE, EXECUTIVE and JUDICIARY." After this the convention proceeded to devise and frame the present constitution, except the few supplementary sections afterwards added upon the recommendation of the state conventions or legislatures. The constitution, upon its face, was designed to be, and is, a great FUNDAMENTAL CHARTER OF GOVERNMENT. It provides for an organization of government to be possessed of the chief attributes of *sovereignty* and *supremacy*. The constitution was to be, and is, the *supreme law of the land*, and all the powers exercised under it, executive, legislative and judicial, within their appropriate sphere, were, and are, sovereign and paramount. The character of the provisions enumerated and granted in the constitution, all tend to the conclusion that it was the purpose of its authors to make of the American people ONE NATION. The power of making treaties, of declaring war and making peace, of imposing taxes for the national defense and general welfare, of enacting uniform laws for naturalization and bankruptcy, and the provision that the citizens of one state should have equal rights and privileges in all others, and that allegiance should be due to the general government, and all officers, state and national, be bound by oath to support the constitution—all imply the same purpose.

The constitution, too, derives its authority from the *people*, as much so as the state constitutions. Its preamble so declares, and it was, in fact, adopted by conventions of the people called in the several states for that purpose. All the original inherent powers of the people for self-govern-

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ment are vested in the national and state governments, each in their proper sphere. The general government is vested with the appropriate governmental powers of a national character necessary for the common defense and general welfare, and the powers for local government are vested by the state constitutions in the state governments. The powers of the general government, it is true, are special and enumerated; and such as are not granted, are reserved to the states or to the people. But the powers thus granted to the general government are granted for the benefit of the *grantors* — the people. They are, therefore, not to be construed like grants to a corporation by a legislature, of rights and immunities, for the special benefit of the grantees. The officers of the government, who exercise its powers, are mere agents of the people, and have no interest in the powers conferred. In this view of the character of the powers conferred upon the national government by the constitution, the rule of construction in respect to such powers must be *liberal*, and such as will further the great objects of the grant and enure to the benefit of the beneficiaries — the great body of the people.

Another consideration of importance in this connection is, that the powers delegated, or enumerated in the constitution, are conferred in general terms, simply enunciating general principles or outlines, and that consequently every grant of power carries with it all the incidental and implied powers essential to its due and full exercise and enjoyment.

We come then to the question :

I. Had congress power to authorize the issuing of treasury notes to perform the office of money ?

It is not claimed that this power is conferred upon congress by any *express* provision of the constitution. But it is insisted and urged in the argument made before us, that the power to make the law in question is conferred upon congress by the 5th subdivision of article 8 of title 1 of the constitution, which provides that congress shall have power

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“to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.” This provision should doubtless be construed in connection with subdivision one of the 10th section, which is as follows : “No state shall enter into any treaty, alliance or confederation, grant letters of marque and reprisal, coin money, emit bills of credit, make any thing but gold and silver coin a tender in payment of debts,” &c. These two provisions, construed together, most conclusively show, I think, that it was the purpose of the framers of the constitution to give to the national government exclusive control of the currency of the country, and to secure thereby *one currency* for the whole country — one national, uniform currency. But that currency, most evidently, was to be a *metallic one*. Gold and silver could only be made a tender in payment of debts by the states. The national government is to *coin* money ; that is, to fix the *national stamp* upon the metals which are to be used as *money* ; to determine the character of the national currency, and what should be the measure or standard of value, and what the different kinds used for money, and into what denominations the money should be divided, or of what it should consist. It was subsequently made a decimal currency by act of congress, and as such has since remained. But the *money of the constitution*, it seem to me very clear, was to be *hard money* — *metallic money*. It was to be *coined* from metals which had an intrinsic value in commerce throughout the civilized world. Nothing else was or is money under these provisions of the constitution. The language of these two provisions is too explicit, it seems to me, to admit of any other construction. But the contemporaneous history and construction of these provisions confirm this view. The original section drafted and proposed to the convention, which provides that congress may borrow money, reads as follows : “To borrow money and emit bills on the credit of the United States.” The words, “and emit bills,” were stricken out upon discussion, on the ground that

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they might seem to warrant or authorize the issuing of paper money by the government. (3 *Madison Papers*, 1344.) Mr. Wilson, who was a prominent member of the convention, said, "It would have a most salutary influence on the credit of the United States to remove the possibility of paper money." Mr. Langdon said that he had rather reject the whole plan than retain the words "and emit bills." The words were stricken out by the vote of nine states to two. *Bills of credit*, as the term is used in the constitution, meant *paper money*. It had reference to the bills of credit issued by the states and by congress during the war of the revolution, generally called and known as *continental money*, which fell into so great disrepute. Mr. Madison, in the 40th number of the *Federalist*, speaks of the prohibition to the states to issue bills of credit as a prohibition against *paper money*, referring to the "pestilent effects" produced by its circulation during the war. The prohibition to the states against issuing bills of credit, and the refusal of the convention to give to congress express power to issue such bills, must be deemed, I think, indicative of the purpose and intent on the part of the framers of the constitution to give to nothing the character and quality of *money*, except *gold* and *silver* and *other precious metals*. The evils of banks of circulation, whatever they are, were not before them, or had not been experienced, and they therefore did not prohibit the creation by the states of banking corporations with the power to issue bills. There was then in existence but one bank in the United States, (the bank of North America,) which was a specie-paying bank, and its notes supposed to represent specie. They had no idea of an irredeemable paper currency, except such as consisted in bills of credit—such as had been issued by congress, and by the separate states during the war.

But notwithstanding the convention refused to give to congress power to issue bills of credit in express words, the constitution most unquestionably does grant that power as

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an *incidental* or *implied* power. In the debate on the question of striking out the words "*emit bills of credit*," Mr. Madison said, "Will it not be sufficient to prohibit making them a *tender*? This will remove the temptation to emit them with unjust views, and promissory notes in that shape may in some emergencies be best." Gouverneur Morris said, "Striking out the words will leave room still for notes of a responsible minister, which will do all the good without the mischief." Mr. Gorham said, "The power, as far as it will be necessary or safe, is included in that of borrowing." In the note to this debate as given in Mr. Madison's Works, vol. 3, 1846, it is stated that the vote of Virginia in the affirmative, on striking out, was occasioned by the acquiescence of Mr. Madison, who became satisfied that striking out the words would not disable the government from the use of public notes as far as they would be safe and proper." That Mr. Madison remained of this opinion is evident from this recommendation in his annual message of December 5, 1815, in which he says, after speaking of the operations of a national bank: "And if neither of these expedients be deemed effectual, it may be deemed necessary to ascertain the terms upon which the notes of the government, no longer required as an instrument of credit, shall be issued upon motives of general policy as a *common medium of circulation*."

But independently of the intent and opinions of the framers of the constitution, the power to issue treasury notes, I think, may properly be deemed included in several of the express grants to congress. The power to "borrow money on the credit of the United States," includes or implies, as an incidental power essential to the exercise of the original power, an authority to issue the requisite securities, or evidences of debt, for the money borrowed. This must, of necessity, be in the shape of treasury bonds or notes, and in such form as congress or the secretary of the treasury may prescribe or deem proper. Subdivision 6 of section 8 grants power to congress "to provide for the punishment of coun-

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terfeiting the securities and current coin of the United States," thus recognizing the valid existence of securities of the United States, and placing them in the same relation and under the same protection as the current coin of the United States. And the provision of the same section that congress shall have power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States," also includes, I think, a power to issue treasury notes in anticipation of the receipts from taxes. Such notes may also be necessary as a medium of payment of taxes, and imposts, and excises.

This power to levy and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defense and general welfare, is perhaps the most important grant of power in the constitution. It was probably for the want of this power, more than for any other defect, that the confederation proved a failure. This provision also assumes that the government will have *debts* to be paid, and this concurs with the power allowing government to borrow money—to issue evidences of debt or securities.

It is quite apparent, indeed it seems self-evident, that *money* is indispensable for the maintenance of civil government. Mr. Hamilton called it the "*vital principle of the body politic*," as "that which sustains its life, and enables it to perform its essential functions." Congress, under this provision, has the unlimited and uncontrollable power of taxation, except that "all duties and imposts and excise shall be uniform throughout the United States." Its power is *absolute, sovereign and supreme*. It is to levy and collect taxes, "to pay the debts, and provide for the common defense and the general welfare." Congress is the exclusive judge of what is essential to the "public welfare, and what is necessary or proper for the *common defense*." For these great governmental purposes, at all times, in peace and war, money, and in large amounts, is demanded—is absolutely

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indispensable. Congress must determine the subjects for taxation, and provide the ways and means to raise the money required. Certainly it may anticipate the collection of taxes by borrowing money, and I cannot see why, if metallic money is scarce, and the collection of taxes impossible, slow or difficult from want of a circulating medium, it may not authorize the issue of treasury notes to supply the deficiency.

In the celebrated argument of Mr. Hamilton on the constitutionality of a bank of the United States, in February, 1791, he says on this subject: "To designate or appoint the money, or a thing in which taxes are to be paid, is not only a proper but a necessary *exercise* of the power of collecting them. The payment might have been required in the commodities themselves; taxes in kind (however ill judged,) are not without precedents even in the United States; or it might have been in the paper money of the several states, or in the bills of the Bank of North America, New York or Massachusetts, all or either of them; or it might have been *in bills issued under the authority of the United States*. The appointment of the money or thing in which taxes are to be paid is an *incident to the power of collection*."

In a debate upon a bill to authorize the issue of treasury notes, in February, 1838, Mr. Calhoun, in support of the bill, said: "The right had been exercised from the commencement of the government *without being questioned*, and according to his conceptions came within the power expressly granted to congress to borrow money, which means neither more nor less than to raise supplies on the public credit." The act in this case passed with the support also of Silas Wright, Mr. Benton, Robert J. Walker, and all the senators of the hard money school, and was approved by Mr. Van Buren, who was then president. The act in this instance amended an act for the issue of \$10,000,000 treasury notes, passed at the September extra session of 1837, which was supported and voted for by Mr. Webster, who on re-

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peated occasions affirmed the power of the government to issue treasury notes. (*See 4th volume Webster's Works, pp. 368, 474, 543, 546; 5th id. 136, 156.*)

This practice of the government, under all administrations, from its origin, with the sanction of all the presidents and leading statesmen of the country, seems to me, ought to put this question, so far as relates to the power of congress, forever at rest. The power to issue the notes being granted or assumed, it becomes then purely a matter in the discretion of the legislature in what form, size and respective amounts they shall be issued. The fact that they are of such denominations, and form, and amounts, as conveniently to go into circulation, and serve the office of money, cannot affect the question of the power to issue them, or detract from their validity as lawful government securities. We come then to the remaining question:

II. Assuming that congress has power to authorize the issue of treasury notes, can it make such notes a legal tender?

If the argument is sound, that congress has the power to authorize the issue of treasury notes, and to pay them out to the public creditors, who will voluntarily receive them as a substitute for money, and that they are valid government securities, I cannot see why it does not follow, as a necessary and legitimate consequence, that it has the power, if the occasion will justify so extraordinary a measure, to declare what shall be their commercial value; in short, to declare that they shall be received and held as lawful money, and a legal tender in payment of all debts, public and private. They are in effect professedly issued to supply the place of money, and to furnish a circulating medium. Very clearly, it seems to me that government has the same power, if the necessities of the case require it, to protect these notes from depreciation, and to enhance their value by making them a legal tender, that it has to prevent the debasement or counterfeiting of coin. What it creates it may protect by all

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suitable laws for that purpose, and by what means it will do so is especially a matter within the discretion of the law-making power.

I agree with the remark of Senator Sumner who, in the discussion in the senate in respect to the act in question, said: "It is difficult to escape the conclusion that if congress is empowered to issue treasury notes, it may affix to these notes such character as shall seem just and proper, declaring the conditions of their circulation and the dues for which they shall be received. Grant the first power and the rest must follow." Confined to the act under discussion, and as a question of legislative discretion, I think this remark entirely correct. But this conclusion may not be readily admitted, and I will therefore proceed to state more fully the reasons on which I think it can be sustained. The power of congress to make these notes receivable for government dues, and payable to all public creditors who will voluntarily receive them, cannot be doubted.

The debatable question is, whether they can be made by law of congress a compulsory legal tender in payment of public and private debts. The provision of the statute is, that they "*shall be lawful money and a legal tender in payment of all debts, public and private.*" Most clearly they are not money. Upon their face they are mere promises to pay money. Each of these bills or notes upon its face contains a *promise* on the part of the United States to *pay* to the bearer \$10. Strictly, this promise calls for, and can only be fulfilled by, the payment of \$10 in *gold or silver coin*. The word "dollars," printed on the face of these notes, means silver or gold coins, with the *stamp* of the United states authority thereon impressed, fixing their value and character. This is the only known and legal standard of value in the United States. The dollar is the unit of value, and means, wherever the word is used or named in any contract, a piece of silver coin composed of $412\frac{1}{2}$ grains of

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standard silver, or gold of equal value, according to the standard of value fixed by law. This is indisputable.

The question then is: Can congress *substitute a governmental promise to pay \$10*, or any other medium of value or mode of payment of debts which shall be effectual in law to discharge a contract calling for *money*, and which confessedly means gold and silver coin? The act in question professes to do this. It substitutes a promise to pay money based upon the credit of the government for the actual payment of money. This, I agree, can only be done by the sovereign authority of the government, and involves the highest exercise of sovereign power. Congress possesses, I think, this sovereign power. Besides the powers to lay and collect taxes, duties, imposts and excises, to borrow money on the credit of the United States, and to provide for the punishment of counterfeiting the securities and current coin of the United States hereinbefore considered, congress has power "to declare war." This is an unquestionable sovereign power, and binds the allegiance of every citizen; for the crime of treason will be committed by any citizen who shall resist by force any law of the United States, or adhere to their enemies, giving them aid and comfort; and congress has power to declare its punishment. The president and senate have power to make treaties, which also bind the nation and become its supreme law.

Congress has power "*to raise and support armies.*" Under this power congress can provide for calling upon, impressing and compelling every citizen personally to aid in carrying on the war it has declared. This power includes *any and every means* adapted to the *end* of war, in the opinion and discretion of congress. Congress has power "to provide and maintain a navy." Under this power it can *take* every ship of our citizens and appropriate it to the public use, to constitute a navy, and take any other means adapted to the use or object of a navy, and to maintain and support it. The power is *absolute and unqualified*, like the power

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to raise armies. Congress has power also "to provide for calling out the militia to execute the laws of the union, suppress insurrection, and repel invasion," and to provide for organizing, arming and disciplining the militia, when employed in the service of the United States. It has power also to erect forts, magazines, arsenals, dockyards and other needful buildings, for war purposes. The United States also is bound to guarantee to every state a republican form of government, and to protect each of them against invasion, and against domestic violence. And congress has power "to make all laws which shall be necessary and proper to carry into execution the foregoing powers, and all other powers vested in the government of the United States, or in any department or officer thereof." All the above enumerated powers are in their nature and character *absolute* and *sovereign*, and all are essential to the existence and maintenance of a national government, and all require and involve for their exercise large expenditures of money.

The case before us has the following statement: "Since the spring of 1861 the government of the United States have been continually waging a war, of hitherto unexampled magnitude, for the suppression of a powerful rebellion, and have been compelled, in so doing, to make expenditures amounting to over \$1,000,000,000." Aside from this statement, I suppose we are entitled to know, judicially, that the government has in the field a vast army of nearly a million of men, and a large and increasing naval force, demanding *immense expenditures of money*, much larger than can be immediately supplied by the metallic currency of the country, or the ordinary resources of the government. The power to raise money by taxes, imposts and duties, is unlimited for the purpose of such war; but most obviously money cannot be raised in this way fast enough, and in sufficient amount to meet the exigencies and demands of the government in raising and maintaining its armies. It has, therefore, no other resource but to "*borrow money*." The power to

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“borrow money” is likewise entirely unlimited, and may be exerted in connection with the taxing power in anticipation of the receipts from taxes, duties and imposts, and may also be exerted as an independent power to an unlimited extent. It is, as I conceive and have endeavored to show, an *express power*, under which treasury notes may be lawfully issued. The issue of such notes, therefore, is simply a process to *borrow money of the people of the United States*, and the provision that such notes shall be a *legal tender* is, or may be, an essential *means* to that end. It is, or may be, essential to give currency to the notes and preserve them from depreciation, from the natural laws of trade, and the arts of speculators or of disloyal citizens.

For the purpose of carrying on the war, in which our people are engaged, the government may lawfully seize and appropriate the property of any citizen for the public use. The sovereign power of a state may do whatever is necessary for the safety and defense of the state. The only limit to its power under our constitution is that the means be, in the opinion of congress, “*necessary and proper*” to accomplish the end in view in the exercise of any of the enumerated powers of government. If the government may seize and appropriate the property of the citizens without limit, to carry on the war and for the common defense, certainly it may take it by means of *forced loans*. All governments, in times of war, have been obliged to resort to such loans, and their lawfulness is unquestionable, for “*salus populi suprema lex*” is the universal rule among all nations, in times of war.

It is said that it may be necessary for the government to borrow money and issue treasury notes, but that this does not make it “*necessary or proper*,” under the general clause of section eight of the constitution, above recited, to make such notes a legal tender. This I conceive to be purely a question of legislative discretion. Money is necessary to carry on the war and sustain the government in the exercise of all the foregoing enumerated powers. If, in the opinion of the

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legislature of the nation, it is necessary and proper to issue treasury notes and to make such notes a legal tender, in order to procure the requisite money and keep up the credit of the government and prevent its failure and overthrow, most certainly the legislative authority of the nation has the sovereign and unquestionable right so to declare and so to enact. It does not pertain to the judiciary to question the propriety of the exercise of its undoubted discretion on the subject. In the celebrated case of *McCulloch v. The State of Maryland*, (4 *Wheat.* 411,) Chief Justice Marshall, in delivering the opinion of the court, said that "when the law is not prohibited and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department and trench on legislative ground."

The grant of the powers to declare and carry on war, to raise and equip armies, to construct and employ a navy, to arm the militia, build forts and arsenals, suppress insurrection and repel invasion, is a grant of the requisite power to use and employ all the means, agencies and instrumentalities known among civilized nations to effect those objects, and is a grant necessarily of the power to procure and use the requisite money for these purposes and by *any means* that congress may deem "*necessary and proper.*" Treasury notes confessedly may be one of those *means*. I speak of treasury notes issued for the purposes of a *currency* and designed to be used and put into circulation as *money*. There is an obvious distinction between such treasury notes, and notes of large size, issued expressly to be sold or negotiated in the market, for investment, like ordinary securities of corporations and individuals. The government must have the same right to issue such paper as individuals or corporations, and such has been the character of most of the treasury notes heretofore issued by the government. Those authorized by the act passed in 1812 were on interest of five per cent, and

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by the act of 1815 notes of the denomination of \$100 and less were authorized, transferable by *delivery* and without interest. Bills under this act were issued of as small denomination as \$10. By the act of 1837, herein before referred to, notes were authorized to be issued as small as \$50. They were to be issued at such interest as the secretary of the treasury might direct, and were in fact issued at a mere nominal interest of one, two and three per cent, and this act, with the same provisions, making the notes transferable by *delivery* and payable to *bearer*, was continued by acts in 1838, 1839, 1840, 1841, 1842 and 1845. This latter class of notes were obviously issued for *circulation* among the people and to be paid to the public creditors *as money*. But under the act of February, 1862, the notes were to be of such denominations as the secretary of the treasury might deem expedient, not less than \$5, to be payable to the bearer, and not bear any interest. Those offered to the defendant in this action were of the denomination of \$10 each, and were of the size and similitude of bank bills, and made and designed professedly for circulation as money. They were intended to be, and notoriously are, paid to the civil, naval and military officers, to soldiers, contractors and other government creditors, *as money*. Such payments would be quite unavailing and very unsatisfactory if such notes were not receivable by the community at large, and did not perform the office of a circulating medium. For this purpose the act makes them a legal tender in payment of all public and private debts. This makes them perform the *office of money* in its highest character, as a *legal substitute* for gold and silver coin. In ordinary times of peace there would be no occasion for such an act. In such times treasury notes would probably be at par throughout the union, and equivalent to gold and silver. Certainly they would, if like the bills of specie-paying banks, they were immediately convertible into specie at the various sub-treasuries of the government, and receivable for all government dues, and the legal tender clause

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therefore would be entirely unnecessary. But now the case is notoriously otherwise. The issue and use of treasury notes as *money*, as *paper money*, issued upon the faith and credit of the government, and not convertible immediately into specie, has been and is an *imperative governmental necessity*. The same necessity creates the law of the case, and makes it constitutional and lawful for congress, in order to render such notes as available as possible, and to give to them all the credit and value which the law can confer, to make them serve as a substitute for gold and silver in the discharge of all public and private debts. The act in this respect necessarily tends to bring to the aid of the government, in keeping up the credit of these notes, the interest, as it is the duty, of the whole commercial, moneyed and creditor classes of the people. If it thus operates to tax capital, the tax, is not unjust, for the value of all property depends in a large degree upon the maintenance and stability of government, and the amount of such tax will depend very much upon the patriotic support which capitalists give to their government, and the efforts they make to sustain its credit. But it is said the act impairs the obligation of contracts. Congress is not prohibited from passing laws which impair the obligation of contracts. This prohibition applies only to the states. Congress may confessedly debase the coin. It may make lead or iron money. It may make the copper cent a dollar, and perform the office of a dollar. This would indirectly impair the obligation of contracts; and congress may pass many other acts which would have that effect. The expediency and propriety of such acts is another question. And it is said that congress is not expressly authorized to declare any kind of money a legal tender. It has express power "to coin money and declare its value." The money it coins is the legal measure of value in the performance of all contracts, and this is equivalent to making it a legal tender. It becomes a legal tender by being made the legal standard of value—legal money.

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The powers of the national government are too often considered and discussed as though it were a mere municipal corporation. It is, as I conceive, a fundamental mistake that the government of the United States does not possess as full, ample and extensive powers to provide for the "general welfare and the common defense," as any other government existing among men. It possesses for this purpose all the original inherent power of the people to protect themselves, and to provide for their self-preservation and general welfare. A state or kingdom is but an aggregation of individuals, and certainly the rights which men possess in a state of nature, to protect themselves from injury and to preserve life, they do not lose when combined into civil society. Government is instituted among men to protect their natural rights, and national life stands upon the same footing as individual life. It is the great office and duty of government to protect and defend it, and any law essential to that end is within the just power of the national legislature.

If the British parliament had, in a time of national peril, passed an act authorizing the issue of government notes, and making them a legal tender in the payment of debts, no man of the slightest legal intelligence would doubt or deny the validity of the law; and this was practically done in England by act of parliament, recognizing and allowing a suspension of specie payments by the Bank of England in 1797, which continued till 1823. During this period the Bank of England notes were practically a legal tender, the bank being prohibited from paying its notes in cash.

There is probably not a government in Europe which has not been compelled in time of war, or national distress, to suspend specie payments, and make forced loans of the people, by making paper promises to pay, in some form, lawful money and a legal tender in payment of debts. This has been done in France in repeated instances, and as late as in 1848 the Bank of France was authorized to suspend specie payments, and its notes made a legal tender. It may per-

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haps be said that the governments of Europe may exercise such powers, because they are not restricted or limited by written constitutions. The powers of our government are none the less ample because they are enumerated in a written constitution. The essential powers of government are substantially the same under all forms of government, and are delegated and intrusted to rulers to be exercised alike for the common good. Power may be, and doubtless is, much abused, under all forms of government; but in republican governments the people possess an advantage and security over others, in the fact that they elect their own rulers, and can dismiss from office those who abuse their trust, and by this process repeal unwholesome laws. This is the only remedy against laws, however injudicious or unwise, which are within the legitimate discretion and power of legislative bodies under our form of government.

Upon the whole case, I think my argument tends to establish the following propositions or conclusions:

1st. That the issue of treasury notes is warranted by the constitution of the United States at all times, in the discretion of congress, as a medium for the payment of taxes under the taxing power, and as a form of security to the public creditors for money loaned under the power "to borrow money."

2d. That the form, size and denomination of such notes, and the making of them in the similitude of bank bills, and payable to bearer, so as to be transferable by delivery, and go into circulation as money, are matters entirely within the discretion of the legislature; and so far as relates to their voluntary receipt and circulation by the public, they stand upon precisely the same footing as bills of exchange or promissory notes issued by private individuals or corporations, and rest exclusively upon their credit as merchantable securities.

3d. That the power to make such notes a substitute for money, and a legal tender in payment of debts, may rest—as an incidental or implied power—upon the power to "im-

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pose taxes, duties and imposts," and upon the power "to borrow money," and also upon the power given to congress "to pass such laws as shall be necessary and proper to carry into effect the other specified powers."

4th. That in connection with these powers, the power to declare war, raise and support armies, to provide and support a navy, to suppress insurrection and repel invasion, being great governmental and sovereign powers, include and imply a grant of all the means necessary to the end of the powers granted, and that money, being an indispensable agent, and necessary to carry such powers into effect, the power is implied to command, obtain and secure it by any practicable means known or practiced among civilized nations; and that the issue of treasury notes, making them a legal tender in payment of debts, is a proper and lawful means to that end—a process of borrowing money from the people—or making from them a forced loan to meet the governmental necessities, and is entirely within the legitimate power of congress, as the sovereign legislative authority of the nation.

It follows from these premises, that the act in question was fully warranted by the express and implied power given to congress, and was and is a measure entirely within the discretion of the national legislature, and with which the judiciary has no rightful authority to interfere.

It is a source of much satisfaction that we can come to this conclusion and sustain the validity of the act in question. It would have been exceedingly unfortunate, and the occasion of profound regret, if, in this state, whose people for the last two years have been pouring out their blood and treasure like water, to maintain the authority of the national government, and the supremacy of the constitution, the judiciary, or any branch of the superior courts of the state, should have felt constrained to declare an act of such great public importance to be in conflict with the fundamental law. We know from the debates in both houses of congress,

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that it was passed with extreme reluctance, and that nothing but a deep conviction of its *absolute necessity* could have induced a sufficient number of senators and members of the house of representatives to vote for it, to have secured its passage. It was passed, most undoubtedly, in that spirit of patriotism which led our fathers of the revolutionary period to encounter and to endure all the evils of *continental money*, and in the belief that the great mass of our people would cheerfully meet and endure the same evils—if need be—before they would consent to the dismemberment of the union, and the overthrow of constitutional government and popular institutions on this continent.

Judgment should therefore be given for the defendant, with costs.

JOHNSON, J. The tender, by the defendant, of the legal tender notes, in satisfaction of the plaintiff's demand, was valid, and they should have been received by the latter, unless it shall be found, upon examination, that his objection, that the act of congress under which such notes were issued and declared to be a legal tender is unconstitutional, was tenable.

The act in question, which was approved February 25, 1862, amongst other provisions, declares that these notes, when issued, "shall also be lawful money and a legal tender in payment of *all debts public and private*, except duties on imports and interest, as aforesaid." Any law made by the congress of the United States, in pursuance of the constitution, and duly approved, is "the supreme law of the land, and the judges of every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary, notwithstanding." (*Constitution*, art. 6.) Unless, therefore, it can be shown that the act of congress in question is not in pursuance of the constitution, it is the supreme law of the land, and the tender was valid, and must be held to satisfy and discharge the demand created by the deposit.

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The general government, possessing all the essential attributes of a national sovereignty, and the legislature being the branch thereof invested with paramount authority, the presumption is unquestionably in favor of the validity of any and all of its acts, and it lies primarily with the party objecting to show that any particular act is in derogation of the constitution. This, however, is of little consequence where the standard is a written organic law, which may always be appealed to, and must determine in all cases where the authority to enact is seriously challenged.

In considering the question thus presented, it must be admitted in the outset that the government of the United States is limited in its powers and authority, to the exercise of those conferred by the organic law, in which it has its being, and that all powers not delegated to it by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people thereof. But it by no means follows from this, that it can take nothing by implication, like a special and inferior tribunal created by statute. It is still a national sovereignty, and within the just scope and measure of the powers with which it has been endowed, is as supreme and potent in its authority as any other human government. And in passing upon the question of the constitutionality of any law of congress, this important consideration is not to be lost sight of. The object which the framers of the constitution and the people who ratified and adopted it as the organic law of this national government, had in view, is clearly and plainly expressed in the preamble. It was, amongst other things, to "establish justice, ensure domestic tranquillity, provide for the common defense and general welfare, and to secure the blessings of liberty to ourselves and our posterity." To secure the attainment of these cardinal ends of all government, the powers deemed necessary or essential thereto were enumerated and conferred under separate and distinct general heads; each of which necessarily comprehends and embraces, as it was intended,

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all the subordinate and auxiliary powers necessary, or incident to the supremacy of such general head of power. And hence, in section 8, after specifying the several powers which congress shall have, in subdivision 17 the power is in express terms given "to make all laws, which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." Here is a plain and unambiguous test in the text of the constitution itself, if the rule prescribed by the statute is not within the plain letter or evident scope of the power enumerated. The question then is, whether the law is necessary or proper for carrying into execution all or either of the enumerated and granted powers. If it is either necessary or proper without being absolutely necessary, the statute is valid, and becomes the supreme law of the land, binding upon the judges of every state.

But to come more directly to the statute in question: has congress the power within the letter or evident meaning of either of the enumerated powers conferred, to declare these treasury notes lawful money and make them a legal tender in payment of all debts, public and private? Among the powers enumerated and expressly conferred, are these: to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; to borrow money on the credit of the United States; to regulate commerce with foreign nations, and among the several states and with the Indian tribes; to coin money and regulate the value thereof and of foreign coin; to provide for the punishment of counterfeiting the securities and current coin of the United States; to declare war; to raise and support armies; to provide and maintain a navy. Unless the power to declare these notes lawful money is fairly embraced in the terms of the power "to coin money and regulate the value thereof," it must be

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conceded that it is not within the express letter of any of the powers enumerated.

It is perfectly obvious upon looking into the various provisions of the constitution, that it was the intention to place the entire power of creating money, and determining and regulating its value for the whole country, in the general government; and hence it is forbidden to the several states, by section 10, to "coin money, emit bills of credit, or make any thing but gold and silver coin a tender in payment of debts." Money is the medium of exchange—the standard or representative of all commercial values. It is that which men receive in exchange and in satisfaction of labor, and its various products; and whether it is intrinsically valuable or otherwise, it is the standard of values by which alone they are all measured. In all civilized governments it consists of coin, of gold, silver and copper, and of bank bills, or bills of credit, issued by the authority of such government. Gold and silver are not naturally money, any more than any other metal, product or fabric. They are made so by law only when manufactured into pieces of coin, of prescribed weight and fineness, and stamped with the requisite inscriptions and devices. These metals are by common consent better adapted for use as money than any other yet discovered, but they become money by the force and operation of law alone.

It is conceded, as I understand the argument, that this power "to coin money and regulate the value thereof," is a power given to congress to enact suitable laws on the subject of the current money of the country. But it is insisted that the power is limited to the enactment of laws for the minting or fabrication of gold and silver only into money, and the regulation of the value of money of that description. This might be so if the language employed had been, "to coin gold and silver into money and regulate the value thereof." But the terms used are, "*to coin money*, and regulate the value thereof." In order, therefore, to place this restriction upon the power, as a matter of judicial construction, it must

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be made to appear not only that "to coin," signifies shaping and stamping metals exclusively, but also that the term "money," in its ordinary popular signification, at the time the constitution was framed and adopted, meant gold and silver coin, and nothing else. But neither of these propositions is true. By looking into any dictionary, it will be seen that "to coin" means not only to shape and stamp, or mint metals, but to make or fabricate other things as well. And we cannot but know from the history of the times that, at the adoption of the constitution, neither in this country nor in any other civilized country, did the money in use consist of gold and silver exclusively. It consisted then, as it has ever since, and probably ever will, in gold and silver, and in paper representing gold and silver, in the shape of bank bills, or bills of credit. The power is, in my judgment, most clearly, to make laws, prescribing what the money of the country shall be, and the value of the money thus created by such laws. If it was intended to restrict the exercise of this power, to enactments on the subject of gold and silver only, we should naturally expect that some terms would have been chosen clearly expressing such limitations. The framers of the constitution certainly must be supposed to have known something of what is termed the evils of paper money, and if it was intended to exclude the creation of that species of money from the power of congress, nothing is more rational or natural than that something of the kind should have been said in clear and explicit terms. If "to coin" is to be restricted in its definition to work upon metals, it applies to other metals as well as gold and silver, and proves too much for the argument. It is not claimed that it was the design to have any other species of metal created money by law; and as neither gold nor silver is mentioned as the substance to be coined, I think it must be held, that the power granted is simply to determine by law what the money of the country shall consist of, and to regulate its standard value.

Considerable stress is laid upon the debates in the conven-

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tion in which the constitution was framed, but I think it far safer to look carefully at the constitution as it was adopted, and endeavor to construe it according to its evident and natural import. It is by no means certain that these debates may not rather mislead than enlighten the judicial mind. The framers of the constitution were but the agents of the people, to prepare it for their acceptance or rejection, and if we could be certain that we had arrived at the exact meaning of these agents, we might still doubt whether the people, when they ratified and adopted it, did not give it a broader and more generous interpretation. We can only arrive at their intention, with any degree of certainty, by attending carefully to the ideas expressed. I can have no doubt that should any other metal, or combination of metals, be discovered, which, in the judgment of congress, was more convenient and suitable for use as money than gold and silver, it might by law make such metal or combination, money, and prohibit the use of gold and silver as money. And I have as little doubt that congress has, under this general head of power to make laws on the subject of the money of the country, ample authority to declare and make by law these promises of the government, money, and a legal tender in payment of all debts whatever. This seems to me a fair and reasonable interpretation of the instrument, in view of the subject of the power, the nature and the functions of the body upon which it was conferred, and the purposes for which it was thus conferred.

The interpretation contended for on the part of the plaintiff, so far from being strict and rigid, as is claimed, would, as it seems to me, be exceedingly loose and conjectural in its very narrowness and poverty of apprehension. It is an authority to make a supreme law, and not a mere employment to bestow labor upon metals, as it would seem to be regarded.

It must be admitted that no power is, in express terms, any where given in the constitution to congress, to make any

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thing a legal tender in payment of debts, public or private. The states are prohibited from making any thing but gold and silver such legal tender. But congress is neither prohibited from making a law upon the subject, nor expressly authorized to enact one. If a direct and explicit authority is needed, it has no power whatever to make gold or silver even, or bullion, or bank notes, or bills of credit, such legal tender. This power, if it exists in congress at all, is lodged there as a necessary and proper incident only, to the full and perfect exercise of some power expressly granted in the instrument. And the statute, in this regard, must find its warrant and sanction in the fact of its necessity or propriety as an auxiliary to the legitimate exercise of some one or more of the enumerated and granted powers.

But there is, I think, no serious difficulty in respect to the existence of this power in congress, to provide that a legal tender may be made, in payment and satisfaction of all debts existing within the jurisdiction of the government, whether public or private. The only controversy which can seriously arise, as it seems to me, must be in regard to what shall be made the legal tender. It is a power which congress has uniformly exercised, and is clearly an incident to the power to regulate commerce. Contracting and paying debts are strictly part and parcel of commerce. And under no civilized government can its commercial business be properly regulated, without some specific provision of law, in regard to paying, satisfying and discharging all debts and obligations, not only to the government but between individuals. The power to regulate commerce includes the power to make laws for every thing which belongs to commerce, a material part of which is the contracting and the payment and final discharge of the debts created thereby.

It is claimed, however, in behalf of the plaintiff that, conceding to congress the power to provide by law for a legal tender, in payment and satisfaction of debts, it is limited in the exercise of such power, by the constitution, to making

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gold and silver coin only such tender. It is admitted that no such restriction is to be found in the language of the constitution, but it is claimed to be irresistibly inferable from the provision prohibiting the states from making any thing else a legal tender. This proposition is wholly untenable. To say, as matter of judicial construction, that a limitation and restriction upon the power of an inferior, by a superior, implies the same limitation and restriction upon the power of the superior, would be in the last degree unwarrantable, within any known rule of construction. The mere statement of such a proposition is its sufficient refutation. Another argument is sought to be derived, against the existence of the power to make paper of this description a legal tender, from what is claimed to have been the uniform practice of the government, from the beginning, to make nothing but gold and silver coin such legal tender. This, if it had been the uniform practice, would be in no respect conclusive, though it would not be entirely without force as an argument. For it is well understood that the general government has many powers which it has never called into exercise, the occasion for their proper exercise having never yet arisen. But the fact is otherwise. The government has not only issued paper of this description from the beginning, whenever the public exigencies required it, but has generally provided by law that it should be receivable in payment of all public dues. And it was held to be a lawful tender in payment of such dues, by Judge Story, in *Thorndike v. The United States*, (2 *Mason*, 1.) It is said in answer to this, that government may properly make such a regulation in regard to its own debts as it chooses, and that it would not follow that it could make such notes a lawful tender between individuals, if it could in discharge of its own dues. But this is no answer. The question is not what the government may do by contract between its agents and other individuals, but what rule it may prescribe as a public and general law. If congress has no power to pass a law making them a legal tender, any such

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law would be void, and they could not be lawfully tendered in satisfaction of a debt, even to the government. But if congress has the power to make them a lawful tender in payment of any debt, it may unquestionably make them such in payment of all debts. The decision, therefore, necessarily affirms the power of congress to make a valid law authorizing the tender in question. A debt between individuals is no more sacred or removed from the reach of the power of government than one from an individual to the government. The question is, has congress the power to provide by law that they shall be a legal tender in payment of any debt?

It is thus seen that congress has, in repeated instances, exercised this very power, not to the same extent or in the same degree, perhaps, but identical in kind, whenever in its judgment the necessities or the convenience of the country required it. The power is clearly, in my judgment, one of the attributes of governmental sovereignty, and may be exercised whenever it is deemed necessary or proper by the sovereign authority. And were it even true that these notes could not rightfully be declared and made lawful money, I have no doubt they could still be made a legal tender. Congress having the power to provide for a tender, in satisfaction of a debt, has necessarily the right to declare what the tender shall consist of. It is not a question of policy or expediency merely, but of power. Of the expediency and propriety of the measure, congress is the sole and exclusive judge. If it has the power to make such a law, its judgment as to the necessity or propriety of it at the time, is conclusive. The courts have no right to question it, except to determine the existence of the power.

It is also claimed that the act is invalid on the ground that it impairs the obligation of contracts, by compelling the creditor to receive something less valuable than gold or silver coin in payment of his lawful demands against his debtors. It cannot be denied that it does in one sense and to a material extent impair the obligation of contracts in the particular

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above stated. But it is not invalid for that reason. The power to pass laws to impair the obligation of contracts is prohibited to the states only, which can pass no law impairing directly or indirectly the obligation of any contract. There is no such limitation upon the power of congress. The argument that the one implies the other, has already been answered. The same effect may however be produced by regulating the value of coin, which it is admitted, may properly be made a legal tender. Instances are not wanting in our national legislation of changing, by law, the existing standard, or degree of fineness of our coin, and laws making foreign coin a legal tender have been repealed. Congress has also enacted general bankrupt laws, which, to a still greater degree, affect the obligation of contracts, destroying entirely their obligatory force, without the consent of the creditor. Such acts have been held constitutional by the supreme court of the United States and by state courts. (*In the matter of Edward Kleim*, How. U. S. Rep. 277, opinion of Mr. Justice Catron. *McCormic v. Pickering*, 4 Comst. 276. *Kunzler v. Kohaus*, 5 Hill, 317. *Sackett v. Andross*, Id. 327.)

I do not, however, rely upon these decisions as controlling in the present case. The power to enact a general bankrupt law, so manifestly includes in it the power to impair the obligation of contracts brought within the operation of the law, that there scarcely seems room for two opinions on the subject. They are, however, authority for the proposition, that where the subject of the enactment is clearly within the granted powers, the fact that it incidentally impairs the obligation of contracts furnishes no valid ground of objection that the act is unconstitutional. The grant of the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof," is an express and not an implied grant. It carries with it and

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includes in it all legitimate incidents and consequences of the laws thus made, of necessity. It would be a strange and unwarrantable proposition that a law clearly within the letter and spirit of an express power, should be held invalid and unconstitutional, merely because in its operation it affected some particular right or interest injuriously.

But while I am able to find ample authority in the grant of power to regulate commerce, for making the notes in question a legal tender, I do not intend by any means to rest my opinion upon that head of power exclusively. We must of necessity take judicial notice of the alarming and critical condition of the government and of the country. We cannot, if we would, ignore the terrible fact that armed rebellion by open and flagrant violence, is seeking the overthrow of the government, menacing its complete and total destruction. Nor that the government thus assailed, in order to preserve its existence and restore its rightful authority, is compelled to raise and support powerful armies and supply them with the munitions of war, to provide and maintain a navy of a magnitude wholly unprecedented in our history, involving an expenditure probably of millions of dollars daily. To meet this extraordinary demand, the ordinary means of the government, and, indeed, the ordinary currency of the whole country, is entirely inadequate. The government must, therefore, not only borrow upon its credit, but must create, as far as practicable, an additional currency to meet its urgent and immediate necessities. The right to borrow necessarily includes in it the right to promise to pay. But in order to borrow to advantage, or indeed to borrow at all, its promises must necessarily have credit, and should have the highest credit which the government is able to confer upon them. If, in the judgment of congress, it was either necessary or proper, in order to enhance the credit of these government promises, to make them a legal tender in the payment of private as well as public debts, it had unquestionably, as I think, the right so to do, and even to declare

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them lawful money. It would be but the making of a law necessary and proper for carrying fairly and reasonably into execution several of the powers expressly granted. That this was the object and purpose congress had in view is evident, not only from the debates when the act was under consideration before that body, but also from the application of the secretary of the treasury to it to insert such a provision in the act. Amongst other reasons assigned by that officer to congress in favor of this act, he says, "but unfortunately there are some persons and some institutions which refuse to receive and pay them, and whose action tends not merely to the unnecessary depreciation of the notes, but to establish discriminations in business against those who in this matter give a cordial support to the government, and in favor of those who do not." But we can see plainly, aside from this, that it was a means well adapted to the accomplishment of the purpose, and therefore entirely legitimate. And this brings this feature of the law within the express words of the grant of power, "to made all laws which shall be necessary and proper for carrying into execution the foregoing powers."

I have no hesitation, therefore, in pronouncing this provision of the act in question perfectly in accordance with the plain letter, intent and spirit of the constitution. I have come to this conclusion upon what has seemed to my mind the plain and necessary construction of the organic law, as it stands written by its framers, and without calling to aid the consideration of those ultimate and extreme powers which every government, having the right to an existence and a place among the nations of the earth, may of necessity employ as a means of self-preservation when assailed by a public enemy with flagrant violence, and thus involved in actual war. No one doubts, I suppose, that any government thus situated may rightfully, if need be, by any suitable means, call to its aid and service the might of every arm and the use of every dollar of the property of each and every subject

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or citizen within its jurisdiction. These are, however, considerations which it is wholly unnecessary to press into this case.

The defendant is therefore entitled to judgment upon the facts presented by the case.

JAMES C. SMITH, J. I had not the advantage of hearing the oral argument in this case, and but for the great importance of the question involved, might have declined the request of the counsel for both parties, made at the hearing, to consider it upon their printed briefs. While I concur with my associates in their conclusion in this case, I am not prepared to adopt entirely the reasoning expressed by them; and as I have had no opportunity to write an opinion, I shall merely state briefly the reasons for my judgment.

I am of the opinion that the provisions of the act of 25th February, 1862, which are alleged by the plaintiff to be unconstitutional, are within the general scope of the power of congress to borrow money on the credit of the United States, and to make all necessary and proper laws for carrying such power into execution. The power is not only to borrow, but also to use the national credit for the purpose; and as the power is unlimited, it includes, incidentally, the right to such use in any and every mode which pertains to the exercise of supreme governmental authority. The *end* being legitimate, and within the scope of the constitution, *all the means* which are appropriate and plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect. (4 *Wheat.* 316.) The primary object of the act in question was to borrow immense sums of money which were needed by the government to meet the extraordinary exigencies of the time; and the provisions of the act that the obligations to be issued should be in a form to circulate as currency, and that they should be a legal tender, were simply modes of using the public credit, which other governments have frequently resorted to, and which our federal government may rightfully employ, as, in

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respect to the use of the public credit for the purpose of borrowing money, it is expressly clothed with unlimited and sovereign power. The act may be regarded as a legislative declaration that the speedy borrowing of large sums of money, upon the national credit, was necessary to the preservation of the government, and that such borrowing could not be effected by any measures less vigorous than those which were adopted. Such being the case, the federal legislature were not only authorized, but were required by the most solemn considerations of duty, as the guardians of the nation, promptly and efficiently to use their supreme power, in respect to the public credit, to its fullest extent, if necessary, and in such mode as in their judgment was essential to the public safety. This, and nothing more, they did by the act in question. Their authority to adapt the notes of the government to the purposes of circulation and tender, in my judgment, stands upon the same ground as their authority to issue treasury notes, and to prescribe their form and terms: both are incidents of the borrowing power.

It is insisted by the plaintiff, that the scheme is not to borrow money, but to enable the government to pay out its own promises as money. But as these promises are ultimately to be redeemed by the government, in money, it is manifest that while they are outstanding, the government is in fact a borrower of the sums expressed upon their face.

The plaintiff also insists that the act in question violates the several provisions of the federal constitution, which prohibit the emission of bills of credit; the making any thing but gold and silver coin a tender in payment of debts; and the passing of any law impairing the obligation of contracts. These prohibitions are contained in the first subdivision of section 10, article 2, which is as follows: "No state shall" (1,) "enter into any treaty, alliance or confederation;" (2,) "grant letters of marque and reprisal;" (3,) "coin money;" (4,) "emit bills of credit;" (5,) "make any thing but

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gold and silver coin a legal tender in payment of debts ;” (6,) “pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts ; or” (7.) “grant any title of nobility.” This section applies, in terms, to the *states* only. No implication can be drawn from its provisions, either in favor of, or against the power of congress over the several subjects to which they relate. By *other* provisions of the constitution, congress is expressly prohibited, on the one hand, from passing bills of attainder or *ex post facto* laws, (*Art. 2, § 9, sub. 3,*) and granting titles of nobility, (*id. sub. 7,*) and on the other hand, is expressly authorized to grant letters of marque and reprisal, (*§ 8, sub. 10,*) and to coin money, (*id. sub. 5,*) and the president is empowered, in conjunction with the senate, to make treaties ; (*Art. 2, § 2, sub. 2,*) while as to the power of congress in respect to the remaining subjects embraced in the subdivision above quoted, to wit, emitting bills of credit, making any thing but gold and silver coin a legal tender, and passing laws impairing the obligation of contracts, the constitution is silent. These last named powers are obviously not on the same footing as those which are expressly prohibited to congress, or as those which are expressly granted. As they are not conferred, congress cannot exercise them as independent, substantive powers ; but as they are not prohibited, there is nothing in the fundamental law to prevent congress from employing them, so far as they may be necessary, as means for carrying out any power clearly given. Thus, an act of congress, passed for the direct and primary purpose of annulling a contract, or impairing its obligation, would be void ; but if the primary object of an act be within any of the granted powers of congress, as for example, the power to coin money and regulate its value, or the power over bankruptcies, the act will be valid, notwithstanding it may incidentally impair the obligation of contracts. (*5 Hill, 317. 4 Comst. 276.*) By parity of reasoning, congress, in the ex-

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ercise of its power of borrowing money, may, as has already been remarked, provide for the issuing of government obligations or promises to pay, and prescribe their form and terms, and may also, if necessary as a means to the lawful end, enhance the value of the obligations to be issued, so as to command the proposed loan, by making them a tender in the payment of debts, and to that extent modifying the obligation of pre-existing contracts. Although the federal constitution grants only enumerated powers, it does not undertake to enumerate the means by which the powers granted may be executed. Any measure not expressly prohibited to congress, which is appropriate to carrying into effect a given power, may be employed therefor by that body in its discretion. If, in this instance, any question is suggested, as to whether the means employed by congress are appropriate to the end in view, to wit, the borrowing of money needed by the government in its efforts to suppress the rebellion and preserve itself, it is effectually answered by the unparalleled success with which the measure has been crowned.

The construction above suggested, it seems to me, is borne out by the views of the members of the convention which framed the constitution, expressed in the debates upon the proposition of Gouverneur Morris, to strike out of the original draft the words expressly authorizing congress to emit bills of credit ; (3 *Madison Papers*, 1343-6,) and also upon the clause which expressly prohibits the same power to the states. (*Id.* 1442.) At any rate, it is manifest from the discussions, that the convention had this very construction in view, and it cannot be affirmed, from what was said in debate, that they did not intend to *leave room for it*, should a vital emergency ever arise making it necessary. But the debates in the convention are a somewhat uncertain guide in construing the constitution. They show that the members of the convention were sometimes disposed to shape the phrase-

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ology of the instrument they were framing with reference to the meaning which they supposed the people would attach to it when it should be presented to them for adoption. So that, after all, the inquiry must be, what did the people intend by their grant of power ; and that must be determined by the language of the grant.

Finally, it is objected that a law impairing the obligation of contracts is against natural justice, and therefore void. "If the primary object of the law in question was not within the scope of the powers of congress, the law would be void for that reason. But its principal object as we have seen is within the power of congress, and it is therefore valid. If the legislature of the union shall pass a law within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is in their judgment contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard ; the ablest and the purest men have differed upon the subject ; and all that the court could properly say in such an event, would be that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are then but two lights in which the subject can be viewed. 1st. If the legislature pursue the authority delegated to them, their acts are valid. 2d. If they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust ; but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act." (*Per Iredell, J. Calder v. Bull*, 3 Dal. 399.)

Being satisfied that the act in question is within the

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power of congress, which I have considered, I have not examined the other positions taken by counsel on the argument.

I think the defendant is entitled to judgment.

WELLES, J. concurred.

Judgment for the defendant.(a.)

[MONROE GENERAL TERM, April 4, 1863. *E. Darwin Smith, Johnson, Welles and J. C. Smith, Justices.*]

(a) The recent unanimous decision of the supreme court of the United States, in the case of *The People ex rel. Bank of Commerce v. The Commissioners of Taxation*, establishing the power of congress to exempt United States securities from state taxation, as an incident of the power to borrow money, sustains in principle the decision in this case, viz: that congress may make treasury notes a legal tender as necessary and proper for the purpose of giving to them the credit and currency essential to borrowing money thereon, and in raising and maintaining the immense armies and navies demanded by the emergency.

VAN VOORHIS vs. BUDD.

Where a tax was assessed upon the roll to *Henry D. Van V.*, while the real name of the person intended was *William H. Van V.*, although he was also known in the town as *Henry Van V.*; *Held* that he was properly charged with the payment of his share of the public taxes by the latter name. *Held*, also, that the letter D. between "Henry" and "Van V." upon the tax roll, was to be regarded as surplusage, upon the principle that the law recognizes but one christian name.

APPEAL from a judgment of the county court of Dutchess county, affirming the judgment of a justice of the peace. The plaintiff sued to recover damages for the seizure and sale of certain personal property; and the defendant justified the taking, as town collector, under a tax warrant issued to him as such. The plaintiff recovered a judgment before the justice.

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Charles Wheaton, for the plaintiff.

H. H. Hustis, for the defendant.

By the Court, BROWN, J. This action is brought against the defendant to recover damages for the seizure and sale of a horse, the property of the plaintiff. The defendant justifies under a tax warrant, issued to him as collector of the town of Fishkill, in the county of Dutchess, for the year 1861.

The tax is assessed upon the roll to Henry D. Van Voorhis, while the real name of the plaintiff is William H. Van Voorhis. The proof upon the trial, however, showed that the plaintiff was also known in the town as Henry Van Voorhis, and he was the person intended to be charged with the payment of the tax. Levi S. Van Kleeck, a witness for the defendant, testified that he was one of the assessors of the town of Fishkill during the year 1861, and made the assessment against the plaintiff to Henry D. Van Voorhis. He saw him and spoke to him about the assessment, and knew him by the name of Henry Van Voorhis. His name was upon the assessment roll for the year previous as Henry D. Van Voorhis, and the witness took the name from that roll. The plaintiff himself was examined as a witness, and said he was more frequently called Henry than William Henry Van Voorhis.

The assessors are, by diligent inquiry, to be made between certain times named in the statute, to ascertain the names of all the taxable inhabitants in their respective towns or wards, and also all the taxable property real or personal within the same, and from these they are to prepare the assessment rolls in the manner prescribed. When the collector receives the tax warrant he is required to call at least once upon the person taxed and demand payment of the tax charged to him on his property. If the person refuse or neglect to make payment the collector shall levy the same by distress and sale of

the goods and chattels of the person who ought to pay the same. It is evident that this law cannot be executed as to the names of persons charged with the payment of taxes with the same precision and exactness formerly observed in regard to the names of persons made parties defendants in actions at law. In these latter proceedings, when the defendant pleaded his misnomer in abatement he was bound to furnish the plaintiff with his real name and swear to the truth of the plea, and the plaintiff might have leave to amend his declaration or institute a new action, and the remedy as well as the right of action was preserved to him, notwithstanding the error in the defendant's name. In the assessment of a tax no such result would ensue. The statute provides no other means than the diligence and inquiries of the assessors to ascertain the real names of the tax-payers ; and if an error is made it is fatal to the recovery of the tax. Reasonable certainty then is all that can or should be required. If the party defendant was as well known by the name given in the declaration as by his baptismal name, that was regarded as a good replication to a plea of misnomer in abatement. And so in the assessment of the tax in question, if the plaintiff was known by the name of Henry Van Voorhis, that was a sufficient justification for charging him with the payment of his share of the public taxes by that name, whatever might have been his real name. This court has held, in the case of *Wheeler v. Anthony*, (10 *Wend.* 346,) that a tax assessed to the widow and heirs of Zophar S. Wheeler deceased, when they actually owned and occupied the farm charged, was a sufficient compliance with the directions of the statute to justify the collector in executing the warrant by the seizure and sale of a cow to satisfy the tax. In respect to the presence of the letter D. between the words Henry and Van Voorhis upon the tax roll, it is to be regarded as surplusage, upon the well known rule that the law recognizes but one christian name. (*See Franklin and oth-*

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ers v. Talmage, 5 John. 84; *Rosevelt v. Gardner*, 2 Cowen, 463.) There was no proof offered upon the trial to show that there was any other person in the town of Fishkill known by the name of Henry Van Voorhis, or Henry D. Van Voorhis, to whom the charge might have been referred; so that there could be no confusion and no uncertainty in regard to the person whose duty it was to pay the tax.

The judgments in the justice's and in the county court should be reversed, with costs.

{DUTCHESS GENERAL TERM, May 11, 1863. *Brown, Sarughan and Lott*, Justices.}

EDWIN H. WHITNEY, executor, and SUSAN COAPMAN, executrix, &c., *vs.* JOHN W. COAPMAN, and ELIZABETH his wife, executrix, &c.

An action will not lie by the executor and one of the two executrixes of a testator, against the other executrix and her husband, to recover damages against the husband for the alleged wrongful conversion by him of certain chattels and choses in action of the testator, in his lifetime.

A legatee *as such* has no right of action in such a case. He does not represent the testator; and whatever right he may have, in respect to the estate, can only be enforced in a proceeding against the executors.

A claim for the wrongful conversion of property of a testator, in his lifetime, belongs primarily to the executors, and can only be enforced by action by them.

APPEAL from an order made at a special term, overruling a demurrer to the complaint. The plaintiffs, together with the defendant Elizabeth A. Coapman, were the executors of Ambrose Foreman, deceased. The plaintiff Susan Coapman was a married woman. The defendant Elizabeth A. Coapman refused to be a plaintiff, and was therefore made a defendant. The action was an action of tort, to recover the value of certain personal property and choses in ac-

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tion, alleged to have been taken by the defendant John W. Coapman from the possession of the testator, in his lifetime, without his consent. The complaint alleged the death of the testator on the 20th of December, 1860, leaving Jonathan L. Foreman, Susan Coapman, wife of Walter C. Coapman, and Elizabeth A. Coapman, wife of John W. Coapman, his children and heirs at law, him surviving, and leaving a last will and testament, wherein and whereby he bequeathed all his personal estate to said Susan and Elizabeth, to be divided equally between them; that the testator, also, in and by his said will, appointed Edwin H. Whitney executor, and the said Susan and Elizabeth executrixes thereof. That the said will was duly admitted to probate, and letters testamentary were issued to all the executors. That the personal estate of the testator consisted of bonds and mortgages, notes, money in specie and bank bills, &c., amounting in value to about \$19,000. That the testator, in his lifetime, kept, at his residence, his said bonds and mortgages, notes and other evidences of debt, and money, in a certain box or trunk; and that a short time before the testator's death, the defendant John W. Coapman, without the consent of the testator, took and carried away said box or trunk, with its contents, to his residence, and still retained the same in his possession. The complaint then set forth the contents of the trunk or box, and alleged that the securities were good and valid. And the plaintiffs alleged that on or about the 1st day of February, 1861, they, as such executrix and executor as aforesaid, demanded of the defendant John W. Coapman that he deliver to them the securities, &c. And they asked for judgment as follows: "Wherefore said plaintiffs, as such executor and executrix as aforesaid, demand judgment in this action against said defendant John W. Coapman, in behalf of said executor and said two executrixes, in the sum of seven thousand nine hundred and fifty dollars, with interest," &c.

The defendant John W. Coapman demurred to the complaint, on these grounds: 1. That the plaintiffs have no le-

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gal capacity to prosecute this action without joining the defendant Elizabeth A. Coapman as a co-plaintiff therein. 2. There is a defect of parties plaintiff, in this, to wit: Walter C. Coapman, the husband of the plaintiff Susan Coapman, should be made a party plaintiff with his wife. 3. The plaintiff Edwin H. Whitney is an improper person to be joined as a plaintiff with Susan Coapman, in an action concerning her separate estate. 4. No joint action can be maintained by, nor joint judgment rendered in favor of, the plaintiffs, in regard to the separate property of the said Susan Coapman. 5. The said Susan Coapman is an improper party to an action concerning the separate property of the defendant Elizabeth A. Coapman. 6. The complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiffs, as executors of Ambrose Foreman, deceased, against this defendant. 7. The complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiffs and the defendant Elizabeth A. Coapman, as executor of the deceased, against this defendant. 8. Separate causes of action, the one in favor of the plaintiff Susan Coapman, concerning her separate property, and the other in favor of Elizabeth A. Copeman, concerning her separate property, are improperly united in the complaint.

The defendant John W. Coapman appealed from the order overruling the demurrer.

David Wright, for the appellant.

Geo. Rathbun, for the respondents.

By the Court, JAMES C. SMITH, J. It seems to me clear, from the allegations in the complaint, that this is nothing more or less than an action by the executor and one of the two executrices of the testator to recover damages against the defendant John W. Coapman for the alleged wrongful conversion by him of certain chattels and choses in action of

the testator, in his lifetime. The other executrix is made a defendant, simply because she is a necessary party, and has refused to join as a plaintiff. No claim is made against her personally, and it is manifest that none could be maintained against her, in this action, even if she were personally charged with the alleged conversion. The plaintiffs have no right of action except as *executors*, and the several executors are regarded in law as but one person representing the testator, and having a joint and entire interest in the testator's effects, which is incapable of being divided.

For precisely the same reason, I think this action cannot be maintained against John W. Coapman, he being the husband of the executrix defendant. By the common law, if a married woman be an executrix, or administratrix, the husband is personally responsible in respect to the administration, and therefore he has a right to act in it with or without her consent, and her acts, if performed without his permission, are of no validity. In short, during the marriage, the *whole* administration is devolved on him. (*Tol. on Ex.* 241, 357. *Sard v. Eland*, *Ld. Raym.* 369. *Ankersteen v. Clarke*, 4 *T. R.* 617.) And it is held that if an executrix marry, and the husband eloiné the goods or is guilty of any other species of *devastavit*, it will be a *devastavit* also by the wife, and they will be both answerable accordingly. On the other hand, if an executrix commit a *devastavit*, and then marry, the husband, as well as the wife, is chargeable for it during the coverture. (*Tol. on Ex.* 358.) Our statute, recognizing these rules of the common law, has provided that "no married woman shall be entitled to letters testamentary, unless her husband consent thereto, by a writing to be filed with the surrogate, and by giving such consent he shall be deemed responsible for her acts jointly with her." (2 *R. S.* 69, § 4.) And under that statute, it has been held that the husband who marries an executrix *after* she has taken out letters testamentary, by the marriage itself, without filing a consent, becomes jointly liable with her for her acts, done as execu-

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trix, after as well as before the marriage, (8 *Paige*, 37;) and if the wife require it, he must be joined in proceedings before the surrogate to compel an account. (2 *Bradf.* 153.) I do not understand that these rules are abrogated by the statutes framed in and since 1848, respecting the rights of married women. Those statutes do not relate to assets in the hands of a married woman as an *executrix*, or to the liability of her husband, for her acts in respect thereto. It is evident from these considerations that the husband of a married woman who is an executrix, is entitled during marriage to possession of the assets; indeed, her possession is his. There is therefore the same difficulty in the way of maintaining this action against John W. Coapman, that there would be if the action were against his wife personally, or if he were in fact executor.

The learned judge who decided this case at special term, conceded that the action will not lie against the husband, unless his wife could, upon the same facts alleged in the complaint, maintain the action against him if she were sole executrix and legatee; but he concluded that in such case she could maintain the action, as otherwise the legatees and creditors would be without remedy. I am compelled, however, to dissent from this position.

It seems to follow necessarily from the legal doctrines already stated, that the wife as *executrix*, merely, could not maintain this action against her husband. It is true, that as the alleged conversion occurred in the lifetime of the testator, the property converted was never assets in the hands of the executors, but the demand for the damages occasioned by the conversion which is the subject matter of the action is assets, and by the common law the acts of the executrix in respect to it, without the concurrence of her husband, are of no validity.

Nor do I perceive that the question is materially varied by the circumstance that she is a *legatee* as well as executrix. It certainly would not be competent for the court, by its judgment in this case, to declare a distribution of the

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estate. For any recovery herein the plaintiffs must ultimately account in a proceeding for that purpose. A legatee, *as such*, has no right of action in a case like this. He does not represent the testator. Whatever rights he may have in respect to the estate, can only be enforced in a proceeding against the *executors*.

I do not think it follows that because this action will not lie, the defendant can retain in his hands the goods converted by him without accounting for their value. At the proper time he may be required to account as an *executor*; and if there are any other remedies which may be resorted to against executors conducting themselves in like manner, they may be applied to him.

But if it were true that legatees and creditors will be without legal remedy if this action fails, that consideration should be addressed to the equitable jurisdiction of the court, and cannot aid an action at law, otherwise unsound.

It is suggested in the opinion below, that the action concerns the "separate estate" of the two married daughters of the testator, and may be supported on that ground. If the views already presented are correct, that position also is untenable. The separate estate thus referred to, is the interest of the daughters as *legatees*. Clearly they cannot, on this ground, enforce in their *own right* a demand belonging to the estate. As has already been said, they do not represent the testator. The demand "belongs, primarily," to the executors, and can only be enforced by action, by them.

I am of the opinion that the order of the special term overruling the demurrer to the complaint, should be reversed.

Ordered accordingly.

MALLORY *vs.* THE TIOGA RAIL ROAD COMPANY.

A rail road company, whose constant employment and business was the transportation of property and passengers upon its rail road, for hire, agreed with the plaintiff to furnish the motive power to draw his cars, laden with his property, over its rail road; the plaintiff being bound to load and unload the cars, and to furnish brakemen to accompany them on the road, who were to be under the control of the defendant's conductor. *Held* that the defendant assumed the liabilities of a *common carrier*, and was liable as such for an injury to the cars of the plaintiff and his property therein, not caused by inevitable accident or the public enemies.

THE defendant is a rail road corporation operating a rail road from Blossburgh, in Pennsylvania, to Corning, New York, a distance of forty miles. The plaintiff was a miner of coal at Blossburgh, which he was in the habit of transporting over the defendant's road, sometimes on the cars of the defendant, but generally on those furnished by him, in which case he also furnished brakemen, to go on the train, under the control of the defendant's conductor, and the cars were loaded and unloaded by the plaintiff. When the plaintiff furnished his own cars, the defendant charged him, for freight, one dollar per ton of coal; when the cars were furnished by the defendant, the charge was one dollar and twenty cents per ton. On the 21st day of June, 1854, the plaintiff's cars, loaded with coal, while being transported from Blossburgh to Corning, and about ten miles from the former place, in Pennsylvania, were thrown from the track, while passing a curve, and fifteen of the cars were more or less broken in pieces, and the contents spilled and partially lost. The action was brought against the defendant as a common carrier; the complaint alleging that the defendant received from him and undertook to carry from Blossburgh to Corning certain cars laden with coal; which the defendant failed to transport. On the occasion in question the plaintiff furnished his own cars and brakemen, and loaded the cars, agreeing to pay a freight of one dollar a ton to the defendant. On the trial the plaintiff claimed that the defendant was a common car-

39 488
42 250
44 666
67 518
61 115
26b 111
42k 354

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rier, but was overruled by the court, on that point. He then gave evidence for the purpose of showing negligence on the part of the defendant, and offered to prove specific facts for that purpose. This evidence was objected to and excluded. The court nonsuited the plaintiff, and refused to submit to the jury the question of the defendant being a common carrier. Exceptions were taken by the plaintiff to the decision.

Geo. T. Spencer, for the plaintiff.

H. M. Hyde, for the defendant.

By the Court, JAMES C. SMITH, J. I have come to the conclusion that the defendants, in receiving from the plaintiff his cars loaded with coal, and undertaking to transport them over their rail road from Blossburgh to Corning, assumed the liabilities of common carriers.

That they were carriers, generally, cannot be questioned. Their constant employment being the transportation of property and passengers upon their rail road, for hire. It is claimed, however, by the defendants, that their undertaking with the plaintiff was special, and not within the scope of their general business, and that the law does not cast upon them the duty of common carriers in respect to it, for two reasons: 1st. They undertook merely to furnish motive power to draw the plaintiff's cars, laden with his property, over their rail road, he to load and unload them; and 2dly, the plaintiff was to provide brakemen to accompany his cars on the route.

In support of their claim, the defendants cite the case of *Wells v. Steam Navigation Company*, (2 Comst. 207.) There, however, the defendants engaged to tow the plaintiff's boat on the Hudson river, which is a common highway and the court held that the defendants were not carriers generally; that the property transported was not in their possession or under their control, and that they were not bailees

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of any description. This brief statement of the points on which that case turned, shows that it differs widely from the case in hand.

Yet, in order to allow the defendants all the aid which they can legitimately derive from that decision, I concede that notwithstanding the defendants in the case at bar were carriers generally, and were the proprietors of the route over which the goods were to be transported, in both which respects their case differs from that of the "Steam Navigation Company." Yet if, as is claimed by them, they simply entered into a special engagement outside of their general business, to provide the plaintiff with sufficient motive power to draw his cars over their road, under the care and control of his servants, they did not thereby assume the obligations of carriers. But the case proved is, in my judgment, materially different from the one thus hypothetically stated.

In the first place, if I correctly apprehend the testimony, the undertaking of the defendants to carry the plaintiff's cars loaded with his coal, over their road, was strictly within the scope of the business which they as a corporation were permitted to carry on. The act of the legislature of the state of Pennsylvania by which they were incorporated, and under which they constructed that part of their road lying in that state, authorized them to "charge and receive tolls, and for freight in and for the transportation of goods * * and for the conveyance of passengers," and among other rates prescribed one "on *empty cars*," and another "on all passengers, *excepting* only such as are *necessarily engaged in conducting the cars*." It also directed that "no person * * shall *place any car* or other carriage" on the defendants' rail road "without a permit or license, first had and obtained from said company, subject to such rules and regulations as shall from time to time be established by the said company, to govern the use of said rail road." And it provided "that all persons using the said road shall only use those cars, wagons and conveyances which shall be adapted thereto,

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which said cars, wagons and conveyances to be used thereon, for the transportation of persons or commodities, shall be prescribed by the said company." That part of the rail road lying in New York was operated by the defendants under an agreement with the Corning and Blossburgh company, a corporation created by the laws of the latter state, and by which such portion of the road was constructed and owned. By that agreement the defendants bound themselves to operate the entire road from Blossburgh to Corning, for the purpose of transporting passengers and property, specifying coal among other things, and for that purpose to furnish and keep in repair the necessary motive power, engines, machinery and cars, (but the agreement expressly provided that they should not be bound to furnish *coal cars*.) In 1854 the plaintiff was engaged in mining and marketing coal, and had large quantities of it carried over the defendants' road, some of it in defendants' cars, but principally in his own. When he furnished cars he also furnished brakemen, who were under the charge of the defendants' conductor, and he loaded and unloaded the cars, whether furnished by the defendants or himself. The price paid for freight per ton was one dollar and twenty cents if the defendants furnished cars, and one dollar when the plaintiff furnished them. On the 21st of June, 1854, the defendants undertook to transport over their road, from Blossburgh to Corning, forty-six cars loaded with coal belonging to the plaintiff. On their way fifteen of the cars were thrown from the track, and this action is brought to recover the damages thus occasioned. It is apparent from this statement not only that the carriage of loaded cars belonging to others over the defendants' road, for hire, was a part of the business expressly authorized by the act of their incorporation, and provided for by their agreement with the Corning and Blossburgh company, but that they had been engaged in thus transporting cars for the plaintiff during several months prior to their undertaking to carry the train in question.

But independently of the special provisions of the act of

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incorporation and the agreement above referred to, I am of the opinion that the defendants' undertaking was in the line of their general business. It was certainly competent for them, as carriers, to undertake to transport the cars of the plaintiff, whether loaded or unloaded, upon trucks or platform cars belonging to themselves; and in such case they would clearly have been liable as carriers. The mere fact that the plaintiff's cars were run upon their own wheels, instead of being placed upon platform cars of the defendants, does not, in my judgment, take the case out of the scope of the defendants' business as carriers, or relieve them from liability as such. If the injury had occurred in consequence of a defect in the running gear of the plaintiff's cars, which the plaintiff ought to have guarded against, the case would have been materially different, for the reason that a carrier is not liable for a loss occasioned by the negligence or fraud of the owner. But I am unable to perceive, in the nature of the undertaking, any sound reason for holding that the defendants did not contract with the plaintiff as carriers.

In the next place, the plaintiff's cars, while being thus transported over the defendants' road, were not under the care and control of the plaintiff's servants. The entire train was controlled and managed by the employees of the defendants. The plaintiff merely furnished brakemen, whose duties, as the term implies, related exclusively to the running of the train, and not to the care or guarding of the plaintiff's property; and they were, in all respects, under the control of the defendants' conductor. They had no efficient means of protecting the property of their principal against the consequences of negligence or fraud, and the circumstance that they accompanied the train merely to assist in running it, does not, in any respect, absolve the defendants from their liability as carriers. If a servant of the owner happen to go with the goods, but there is no intention to let him meddle with the care of them, the carrier will be answerable for loss. (*Marsh. Ins. B.* 1, ch. 7, § 5; *Abbott on Ship.*, part 3, ch.

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2, § 3. *Story on Bail*. § 533.) So, if a man travel in a stage coach, and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost. (*Per Chambre, J. in Robinson v. Dunmore*, 2 *Bos. & Pull.* 418.) It was said by Bronson, J. in *Hollister v. Nowlen*, (19 *Wend.* 237,) that “when there is no fraud, the fact that the owner accompanies the property, cannot affect the principle on which the carrier is charged in case of loss.” He likened the liability of a carrier to that of an innkeeper, and cited the remark in *Calye’s case*, (8 *Co.* 63,) that “it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he lodged, and that he left the door open; but he ought to keep the goods and chattels of his guest there in safety.”

The defendant’s possession of the plaintiff’s cars, while on the route, was none the less complete, by reason of the circumstance that they were loaded, and to be unloaded, by the plaintiff. In this respect the case is precisely like that of a stage coach proprietor carrying the trunk of his passenger.

I have now considered all the circumstances relied upon by the defendant to take this case out of the rule that the carrier is liable for loss, unless he shows that it was caused by inevitable accident or the public enemies. I fully appreciate the force of the suggestion that the rule is rigorous and sometimes severe, and that courts have, in various instances, refused to extend it to new cases; but, nevertheless, the rule is too well established to be questioned, and I regard this case as fully within its policy, which, as was said by Lord Mansfield, in *Forward v. Pittard*, (1 *T. R.* 27,) is “to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled.”

If these views are correct, there should be a new trial.

New trial granted.

[MONROE GENERAL TERM, December 1, 1862. *Johnson, J. C. Smith and Welles*, Justices.]

CRAIG vs. THE ROCHESTER CITY and BRIGHTON RAIL
ROAD COMPANY.

The appropriation of a highway, by a rail road company which enters upon and occupies such highway with the track of its road, is the imposition of an additional burden upon, and a taking of the property of, the owner of the fee, within the meaning of the constitutional provision which forbids such taking without compensation; and the company can derive no title under acts of the legislature and the license of municipal authorities, without the consent of the owner of the fee, or the appraisal and payment of his damages in the mode provided by law.

There is no distinction in this respect, between rail roads operated by steam, and those upon which animals, only, are used as a motive power.

MOTION to dissolve an injunction restraining the defendant from laying down the track of its rail road in a street of the city of Rochester, opposite the plaintiff's premises; no consent from the plaintiff, who was the owner of the fee to the centre of the street, having been obtained, or damages appraised and paid. The defendant was duly incorporated under the general rail road act, to construct a horse rail road from the city of Rochester to the village of Brighton, and had obtained a license from the municipal authorities of Rochester to lay its rails on certain streets of that city, of which the street in question was one.

T. R. Strong, for the plaintiff.

W. F. Cogswell, for the defendant.

JOHNSON, J. In the case of *Williams v. The New York Central Rail Road Co.*, (16 N. Y. Rep. 97,) it was held that an appropriation of a highway by a rail road company, is the imposition of an additional burthen upon, and the taking of the property of the owner of the fee, within the meaning of the constitutional provision which forbids such taking without compensation; and that the company can derive no title by any act of the legislature, or of any municipal authority,

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without the consent of the owner of the fee, or the appraisal and payment of his damages in the mode prescribed by law. The same principle was again asserted in *Carpenter v. Oswego and Syracuse Rail Road Co.*, (24 N. Y. Rep. 655,) and also in *Mahon v. New York Central Rail Road Co.*, (*Id.* 658.) In the latter case, Clerke, J. who delivered the opinion of the court, says, "an easement for the purpose of a highway does not authorize, as against the proprietors of the soil, the laying down of a railroad upon the track of the highway. The use of the land for a rail road is totally different from that public right of passage for which highways were designed." And still more recently, it is understood the same court, in a case yet unreported, has emphatically reaffirmed the same doctrine. This must now be regarded as the settled law of this state, no other court having the power to overrule, or the right to disregard, the decisions of the court of appeals.

These decisions settle and determine most conclusively the questions presented in this case, the important one being whether the defendant can use and occupy the soil of the street for its rail road without the consent of the owner or owners of the fee, or the appraisal and payment of damages to such owners. If any thing can be regarded as settled by judicial determination, this, with us at least, is no longer an open question.

It is claimed, however, in behalf of the defendant, that inasmuch as the cars on the defendant's road are to be moved by animal, instead of mechanical power, 'upon the railway, the decisions above referred to do not apply to this case, and several decisions of this court are cited which do hold that the appropriation of a street or highway, by a rail road company, so far as is necessary for the purpose of laying down and maintaining its track thereon, upon which its vehicles are to be moved by animal power, is not a taking of the property of the owners of the fee, within the meaning of the constitutional provision requiring compensation to be

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made. There are several cases of this kind, in this court, it must be admitted, distinctly asserting this doctrine. But so far as they are contrary to the decisions of the court of appeals they are of no force or authority whatever, and are not to be followed. This corporation was formed under the general rail road law, and of course has no power, rights, or privileges, superior to other corporations, created under the same law. It can take under its charter and franchise, precisely what other corporations created in like manner can take, without making compensation, or without the consent of the owner, and nothing more.

Nothing can be clearer than that the burthen which the court of appeals has declared to be an addition to that of an easement of a highway, and a taking of private property, within the meaning of the provision of the constitution before referred to, does not consist in the particular force by which the carriage is drawn along the street. Every one must see that simply propelling the carriage along the street, whether by horses or mules, or steam, or any other mechanical contrivance, would be simply exercising the right of passage over the highway, and no other or different right. But the new and additional servitude or burthen, which constitutes the taking or appropriation, consists principally, if not entirely, in the use and occupation of the soil of the street, in laying down and maintaining thereon the permanent structure upon which alone the principal business of the corporation is to be carried on, as the cases unmistakably show. This is a permanent and exclusive right and occupancy, which no other corporation or person can enjoy in common with the defendant, without its permission.

I am aware of the interpretation put by BROWN, J. in the case of *The Brooklyn Central and Jamaica Rail Road Co. v. The Brooklyn City Rail Road Co.*, (33 Barb. 420,) upon the decision in the case of *Williams v. The New York Central Rail Road Company*, above cited. But it is only necessary to refer to the opinion in that case, to show that

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the learned justice has entirely misconceived the grounds on which the decision must have been rested by the other judges. In the case now before us, it is true, all persons having occasion to use the street, or streets, in which the defendant's track is to be laid may, under the restrictions imposed upon this corporation by the municipal authority of the city, travel upon the track of the road, the same as upon other parts of the street, but not in the same manner, and for the same purpose for which it is to be used by the corporation. To a certain extent, and in very material particulars, the right to the use of the track, for the purposes of passage merely, is in the company exclusively, and not common alike to all. It may be granted that the right of the defendant to the use of its track within the bounds of the city, is considerably less exclusive than it may be beyond those boundaries, where no special restrictions have been placed upon it, beyond those imposed by the statute. But the difference is one of degree merely, and in no respect fundamental.

The provisions of the constitution must apply to the rights and the immunities of this corporation in respect to taking private property, alike in Rochester and in Brighton. In either town, so far as the principle of this case is concerned, the sole question is, does the corporation take private property, or to any extent burden it, beyond the servitude of the easement of the highway.

This question, as has been seen, has been repeatedly answered by the court of last resort, and is no longer matter for controversy. Until that court shall see fit to reverse its numerous decisions upon this question, the defendant, before it can lay down and use its track in the street, must either obtain the consent of the owner of the fee in such street, over which the track is laid, or have the damages appraised, and payment made, as prescribed by statute. I have come to this conclusion after a careful consideration of all the authorities bearing upon the subject, and not without regret on account of the sacrifice of individual interests and public convenience.

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which it may occasion. But the rule of law, when once ascertained, must be upheld and enforced by all courts, whatever the detriment to the interests of individuals or to the ease and convenience of the public. I shall not attempt to go over the several cases decided in this court, in the first and second judicial districts, to which we have been referred by the defendant's counsel, for the purpose of pointing out the erroneous character of the decisions, or of showing their entire inapplicability to the case before us. I rest the decision in this case entirely upon those of the court of appeals, which cannot, as I conceive, without manifest perversion, be distinguished, in any essential particular, from the present case. It may be that in the city of New York where the fee of all the streets is claimed and held to be in the city, the consent of the city authorities to the laying down and maintaining a rail road in the streets, is to be regarded as the consent of the owner of the fee, as held by my brother WELLES, in the case of *The People v. Kerr*, (37 Barb. 357.) But the conclusion of SUTHERLAND, J., in the same case, that the cases of *The Trustees of the Presbyterian Church in Waterloo v. The Auburn and Rochester Rail Road Co.*, (3 Hill, 567,) and *Williams v. The New York Central Rail Road Co.*, (*supra*,) "should be considered as having been decided on the theory that the acts of the legislature authorizing the construction of the roads required these companies to acquire title to the soil of the highway and to compensate the owner therefor," is without any foundation whatever, as will plainly appear from an examination of those cases. But, even if it were so, it would not aid the defendant here, because the act under which it has its being has the same requirement in regard to compensation.

I have reason to know, however, that in the latter case, (*Williams v. The New York Central Rail Road Co.*,) the court of appeals, when the case was first argued, was divided and unable to come to a decision on the very question which lies at the foundation of this, and all kindred cases, to wit:

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Whether using a public street by a rail road company for the track of its road, was taking private property for public use within the meaning of the constitution, or whether it was but a mere mode of using and enjoying the public easement, without any essential extension or enlargement of such easement, or encroachment upon the remaining rights of the source of the fee. Upon a re-argument before the same court, composed in part of other judges, the case was decided unanimously adversely to my views, and obviously, as appears from the reported case, upon the same questions on which the court had been previously divided. That decision settled and determined the questions before controverted, and this defendant, as well as others, must submit to its authority.

Since writing the foregoing opinion, I have been favored with a manuscript copy of the opinion of the court of appeals, delivered by Smith, justice, in the recent case, above referred to, of *Wager v. The Troy Union Rail Road Co.*, in which not only are the former decisions reaffirmed, but the distinction sought to be made between rail roads operated by steam or horse power, is declared to be without foundation, so far as the constitutional prohibition against taking private property without compensation is concerned.

The motion must therefore be denied, with costs.

JAMES C. SMITH, J. The ground on which the defendant claims the right, with the assent of the city council, to construct its proposed rail road upon the land of the plaintiff covered by the public street, without making compensation to the plaintiff, and without his consent, is clearly stated by the defendant's counsel in these words: "The building and using of a horse rail road in the streets of a city, without the consent of the owner of the soil over which the streets are laid, is merely a mode of exercising the public right of travel, and therefore is not an appropriation of the property of the owner of the land requiring compensation."

I am of the opinion that this position is unsound, and that

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it is not only unsupported by any adjudication binding upon this court, but that it conflicts with the decisions of the courts of this state in the following cases: (*The Trustees of the Presbyterian Society in Waterloo v. The Auburn and Rochester R. R. Co.*, 3 Hill, 567; *Davis and others v. The Mayor &c. of New York and others*, 14 N. Y. Rep. 506; *Williams v. The New York Central R. R. Co.*, 16 id. 97; *Mahon v. The Utica and Schenectady R. R. Co.*, 1 Lal. Sup. 156; *Mahon v. The New York Central R. R. Co.*, 24 N. Y. Rep. 658; *Carpenter v. The Oswego and Syracuse R. R. Co.*, Id. 655; and *Wager v. The Troy Union R. R. Co.*, decided by the court of appeals in December, 1862, and not yet reported.) These cases establish, beyond all question, the broad doctrine that the appropriation of a highway by a rail road company which enters upon and occupies such highway with the track of its road, is the imposition of an additional burden upon, and a taking of the property of the owner of the fee, within the meaning of the constitutional provision which forbids such taking without compensation; and that the company can derive no title under acts of the legislature and the license of municipal authorities, without the consent of the owner of the fee, or the appraisal and payment of his damages in the mode provided by law.

It is claimed, however, on the part of the defendants, that the cases above cited relate exclusively to rail roads operated by steam, and have no application to rail roads upon which horses only are used as a motive power; and this claim presents the precise question to be determined in this case. In support of it, the defendant insists that there is an essential difference in the nature of the two classes of roads, not merely in respect to the motive power employed upon them, but also as to their mode of construction; the steam road being so built as that it is impracticable to drive a vehicle along or upon its track, while, as is asserted, the track of a horse rail road is not only so laid that the public can use it with ordinary vehicles, but the law secures to the public the right to

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such use. In my judgment, the distinctions adverted to present no substantial difference between the two classes of roads in respect to the questions in litigation; and both classes are within the principle of the cases above cited.

The case of *Davis v. The Mayor &c. of New York*, (*supra*,) decided in December, 1856, related to a rail road of the same class as that which the defendant in this case proposes to construct. It was to be built in Broadway, and the resolution of the common council under which authority was claimed to construct it, expressly provided that no motive power except horses should be used below Fifty-Ninth street. Denio, J. who delivered the leading opinion, came to the conclusion that the establishment of such a road is not within the jurisdiction conferred upon the corporation of New York over the roads and streets in that city, although their jurisdiction over that subject is necessarily very large. In giving his reasons, he adverted to two essential points of difference between a highway and a rail road, one of which is that the object of a highway is to afford to every citizen an opportunity to pass on foot or with his horses and carriages from one locality to another; but a rail road does not facilitate and generally does not admit of those modes of passage. He remarked, in commenting upon this point, that "when the rail road carriages are not moved by the power of steam, but by horses, the tracks, where they do not rise above the street level, may be safely crossed, and to a limited extent may be used for passing lengthwise. This is, however, only identical, and not a necessary feature of a rail road." The other point of difference adverted to by him is, that it is essential to the legal idea of a highway that it shall be common to all; but a rail road is a strict monopoly, entirely excluding all idea of competition. It is obvious that these forcible considerations apply with equal pertinency to both classes of rail roads, and were so intended by Judge Denio; and it is to be remarked that, although three of his associates differed from him in some respects, neither of them claimed

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that in regard to the power of the city corporation to authorize the construction of a rail road in the streets of the city, there is any distinction between a rail road upon which animals only are used as a motive power and one operated by steam.

In *Williams v. The New York Central Rail Road Co.*, (*supra*,) decided a few months after the case of *Davis v. The Mayor*, the reasoning of Selden, J. who delivered the leading opinion, applied as well to one class of roads as the other. While he expressly concedes that if the only difference between the ordinary use of a highway and the use of it as a rail road consisted in the introduction of a new motive power, it would not be material (*p. 108*) he asserts—and the position is vital to his argument—that there is a material distinction “between the common right of every man to use upon the road a conveyance of his own at will, and the right of a corporation to use its conveyances to the exclusion of all others.”

In addition to the points of difference between a highway and a rail road above adverted to, others were suggested on the argument before us which I think are entitled to consideration.

A right of way, whether public or private, is a mere *easement*, and as such, being incorporeal, it does not include a right to an exclusive and permanent occupation of the soil; but the construction and use of a rail road track upon the land of another is an occupation of the soil, both permanent and exclusive. Thus ejectment will not lie against one who exercises only an easement in land as a highway, (*Child v. Chappell*, 5 *Seld.* 246,) yet it has been held that against a rail road corporation laying down its track and rails in a public street, ejectment will lie by the owner of the fee subject to the easement, although the track has not been used. (*Carpenter v. Oswego and Syracuse Rail Road Co.*, (*supra*.) This distinction is not theoretical merely. It results from the ruling in the case last cited, that the laying down of the

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track and rails of a rail road corporation in a public street is of itself such a possession as would, if continued for twenty years adversely to the owner of the soil, vest in the corporation a *fee*, and not a mere right of way or easement, by prescription. In this respect the construction and operating of a rail road upon the land of another, accompanied by a claim of title, is an act of the same character as the building and occupying of a house under similar circumstances. It is an assertion of the right of *remaining* upon the soil, and not merely of passing over it. Again, a right of way may be acquired by prescription or dedication; but it seems that a right to use land for the purpose of a rail road cannot be so acquired. (*Cortelyou v. Van Brundt*, 2 *John*. 357. *Pear-sall v. Post*, 20 *Wend*. 111. *S. C. in error*, 22 *id.* 425.)

Now, in respect to the mode or character of the occupation of the soil, which so essentially distinguishes a rail road from a highway, and which, in the case of a rail road constructed in a highway, is a wrong to the owner of the fee, the two classes of rail roads are precisely alike, and the differences between them, relied upon by the defendant, pertain only to the use of the structure.

But independently of the considerations already presented, it seems to me impossible to avoid the conclusion that the building and using of a rail road in the streets of a populous city, as proposed by the defendant, instead of being a mode of exercising the public right of travel, is an infringement of the right and an obstruction to its use. As is said by Judge Denio, in *Davis v. The Mayor*, (*supra*), "we may be allowed, without the testimony of witnesses, to know enough of the method of operating rail roads to say that their carriages are quite unlike the vehicles used on other roads. They are necessarily large machines, occupying the space which would be required for several carriages of any other kind, and containing passengers enough to fill a great many of the carriages used on other streets or roads." They are so constructed that they cannot run on an ordinary highway,

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and are, therefore, confined to the rails, and thus they cannot turn out at pleasure, nor avoid other carriages stopping on the street to take up or set down passengers or freight, or for other necessary and lawful purposes. Although ordinary carriages can run in the groove made by the railroad company, provided their axles are of the proper length and their tires are not too wide, they must in all circumstances yield the way to the cars of the rail road company, in order to avoid collision, and the latter must necessarily be exempted from the law of the road in respect to turning out, to which all other carriages are subject. (*Hegan v. The Eighth Avenue Rail Road Co.*, 15 N. Y. Rep. 380.) It has consequently been held that if an individual sees fit to run his carriage or wagon upon the rails of a city rail road company, he is bound to exercise more care and diligence to avoid collision than if he was not upon the track, and to see that an approaching car is not impeded; and if through his negligence in this respect a collision ensues, he shall not have damages against the company, even though the servants of the latter are also in fault. (*Wilbrand v. The Eighth Avenue Rail Road Co.*, 3 Bosw. 314.) This ruling seems reasonable and even indispensable if rail roads are to be permitted in public streets, but it obviously concedes to the company a right to the use of that portion of the highway covered by their track which is at all times superior to the right of other travelers, and which wholly excludes them therefrom, if the business of the company is so large as to require the constant use of their track. I cannot assent to the proposition that such use of the highway is a mode of exercising the public right of travel.

Unquestionably the obstruction to the highway in the case of a rail road constructed as the defendant proposes to construct its road, and upon which horses are used as the only motive power, is much less than in the case of a rail road operated by steam; but the difference is only in degree.

The defendant is not aided by the cases which it cites relating to turnpike and plank road companies. (*Benedict v. Goff*,

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3 Barb. S. C. R. 459. *Commonwealth v. Wilkinson*, 16 Pick. 175, and remarks of Denio, J. in *Davis v. The Mayor*, 14 N. Y. Rep. 516.) Those cases stand upon the ground that turnpikes and plank roads are public highways, as every citizen has the right to travel on them in his own mode of conveyance; that the imposition of tolls is a method of keeping them in repair; and that in respect to plank roads no importance should be attached to the circumstance that planks are used for the road bed, as the intent of the statute authorizing them is simply to provide a road constructed of some hard and durable material.

I have not discovered an adjudication of the precise question before us in any of the cases in this state, to which we have been referred. In neither of them, do I understand, was the litigation between a rail road company and the owner of the soil covered by the street. *The Brooklyn City Rail Road cases*, (33 Barb. 420; 35 *id.* 364,) were between two companies, and the principle to be deduced from them is that each company, as against the other, must be considered as exercising a public use, subject to the imposition by the public of any additional use consistent therewith. (See 24 N. Y. Rep. 345.) The opinions expressed respecting the rights of private owners of the soil, who were not parties nor in any way interested, have not the force of authority. In *Mason v. The Brooklyn City and Newtown Rail Road Co.*, (35 Barb. 374,) it does not appear that the defendants had appropriated the plaintiff's land, or that he owned the fee of the street. The ground of his action was that the proposed railway would be specially injurious to him as an owner of adjacent property. The case should therefore be classed with *Fletcher v. The Auburn and Syracuse Rail Road Co.*, (25 Wend. 464,) and *Chapman v. The Albany and Schenectady Rail Road Co.*, (10 Barb. 360,) the distinction between which and cases like the one at bar is pointed out by Selden, J. in *Williams' case*, 16 N. Y. Rep. 104.) *The People v. Kerr* (37 Barb. 857) was decided,

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so far as the private plaintiffs were concerned, upon the ground that they had no property whatever in the streets, the fee being held to be in the corporation of the city of New York. But if these cases could be regarded as deciding the very question now under consideration, we should be obliged to disregard them, as being in conflict with the decisions of the court of appeals.

Even if the question before us were an open one, its decision could not be legitimately affected by the suggestion that the proposed railway will be, in some respects, a public convenience. The question is one of strict legal right, and our province is to declare the law, not to make it. No amount of public advantage will justify an unwarrantable encroachment upon private property, however inconsiderable it may be. If the property of the plaintiff is needed for public use, it may be taken for such use, even without his consent, on compensation being made, but on that condition only; and if, as is claimed, it is of little value, the compensation required will of course be but slight.

I am of the opinion that the motion to vacate the injunction order should be denied, with ten dollars costs to the plaintiff.

WELLES, P. J. concurred.

Motion denied.

[MONROE GENERAL TERM, March 2, 1863. *Welles, Johnson and J. C. Smith*, Justices.]

MARIETTE HINE and others *vs.* LEANDER HINE and others,
executors, &c.

When a parent, or other person *in loco parentis*, bequeaths a legacy to a child or grandchild, and afterwards, in his lifetime, gives a portion or makes a provision for the same child or grandchild, without expressing it to be in lieu of the legacy, it will in general be deemed a satisfaction or ademption of the legacy.

A legacy to a child, regarded as a portion, is a deliberate distribution to such child, or among his children, of such portions of his estate as the testator thinks fit. If the testator, during his life, advances that which he has adjudged to be the due portion of the legatee, the law presumes that he has satisfied the portion; and this presumption must prevail until overcome by evidence of a contrary intent on the part of the testator.

A gift by way of advancement, in order to work a satisfaction of the legacy, need not be in all respects identical with the latter. If they are substantially the same, a small variance in the time of payment, or other trifling difference, will not vary the application of the rule.

When a legacy is given for a particular purpose specified in the will, and the testator, during his life, accomplishes the same purpose, or furnishes the intended legatee and beneficiary with money for that purpose, the legacy is satisfied.

THE plaintiffs, as widow and heirs at law of Orlando Hine, deceased, bring this action to compel the executors of Elkanah Hine to carry out and execute a provision in the will of the latter in favor of Orlando Hine and his heirs. Elkanah Hine made his will May 24, 1852, and died August 9, 1857. Orlando Hine died April 12, 1858. At the time of making his will Elkanah had three sons, of whom Orlando was one, and two daughters; and by his will he recited that in the first division of his property it was his intention to give to each of his sons two thousand dollars, and to each of his daughters one thousand dollars; that to one of his sons he had made the advance, partly in aiding him to buy a farm, and the residue by deeding to him a piece of land; and that to another of his sons he had made the advance by conveying to him a farm and taking from him a mortgage for the residue of the purchase money, after deducting the \$2000; that he had given to one of his daughters four hun-

39 56
67 45
9h 28
14h 30
43h 28

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dred dollars of her portion in land of that value, and to the other one hundred dollars ; and that he had given and advanced to his son Orlando four hundred dollars. By the third clause of his will he gave to his executors sixteen hundred dollars in trust for the purchase of a farm for the benefit of Orlando, the title to which was to be held by the executors for three years after its purchase, or until, in the discretion of the executors, it would be prudent for the interest of the family of Orlando to vest the title in him, at which time the title was to be vested in Orlando, or in case of his death in his heirs. By the residuary clause the children were to share equally in the residue after the payment of the legacies and satisfying the other provisions of the will, under which about four thousand dollars will be divided. The testator directed his executors to give up to his son Orlando all notes or other obligations which he held against him, to be canceled, as they were included in the amount advanced to him.

About April 1, 1853, the testator advanced to his son Orlando fifteen hundred dollars, to aid him in paying for a farm which he had contracted to purchase, and the money was so applied and the farm conveyed to the son. The testator took from Orlando a receipt in these words :

“ \$1500.

Lafayette, April 1st, 1853.

Received of Elkanah Hine fifteen hundred dollars, to make a payment on the farm I bought of Norman Baker, which money I am to account for without interest.

ORLANDO HINE.”

And after that, the testator let Orlando have about one hundred dollars on two occasions, taking his notes for the amounts.

The cause was tried before a referee, and on the trial it was found, under objection, that Orlando applied for the fifteen hundred dollars as a part of his portion of the estate of his father, and that the testator gave it to him as such portion ; and that both Orlando and the testator subsequently, on different occasions, spoke of it as an advance of so much of

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the amount intended for him, under the will, and as a part of his portion of \$2000. The referee found that the same was advanced with the intention on the part of the testator of satisfying to that amount the legacy of \$1600 to said Orlando, mentioned in the will, "and that the remainder of the legacy had been satisfied by the testator in his lifetime."

The complaint was dismissed, and the plaintiffs appealed.

B. Davis Noxon, for the appellants.

C. Andrews, for the respondents.

By the Court, ALLEN, J. The testator, in the body of his will, has expressly avowed his intention to make his children equal in the distribution of his estate by advancements during his life and the portions secured to each by his will, and the judgment of the referee clearly falls in with and carries out this intention. And from any express declarations of the testator, or any direct provision in the will for an ademption of legacies, the presumption of equity is against double portions. There has been some fault found with the rule as a rule of presumption or of evidence, and some with the reasons upon which it has been supported, by which a legacy or portion given by will is deemed satisfied by an advancement during the life of the testator. But the rule is unquestioned and the presumption of evidence well settled. It is carefully stated in *Langdon v. Astor's Ex'rs*, (16 N. Y. Rep. 34,) "for instance, when a parent or other person *in loco parentis* bequeaths a legacy to a child or grandchild, and afterwards, in his lifetime, gives a portion or makes a provision for the same child or grandchild, without expressing it to be in lieu of the legacy, it will, in general, be deemed a satisfaction or ademption of the legacy. This is upon the ground that the legacy is considered a portion, and if the testator afterwards advances the same sum upon the child's marriage or any other occasion, he does it to ac-

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accomplish his original object in giving a portion. Under such circumstances, it is held to be intended by the testator as a satisfaction and not a double portion." This is the spirit and nearly the language of the leading cases and of the elementary writers upon this branch of the law. (*Story's Eq. Jur.* §§ 1111, 1112. *Ellison v. Cookson*, 1 *Vesey, jun.* 100. *Trimmer v. Bayne*, 7 *id.* 508. *Hinchcliffe v. Hinchcliffe*, 3 *id.* 516. *Carver v. Bolles*, 2 *R. & Mylne*, 301. 1 *Roper on Legacies*, 374. *Debeze v. Mann*, 2 *Bro. Ch. Cas.* 166.) A legacy to a child regarded as a portion is a deliberate distribution to such child, or among his children, of such portions of his estate as the testator thinks fit. If the testator, during his life, advances that which he has adjudged to be the due portion for the legatee, the law presumes that he has satisfied the portion; and this presumption must prevail until overcome by evidence of a contrary intent on the part of the testator and devisor. The gift *inter vivos* or donation by way of advancement, may not be in all respects identical with the legacy or portion given by the will, in order to work a complete satisfaction of the latter. If they are substantially the same, a small variance in the time of payment, or other trifling difference, will not vary the application of the rule. (*Story's Eq. Jur.* § 1110. *Davys v. Baucher*, 3 *Young & Coll.* 392. *Pym v. Lockyer*, 5 *M. & C.* 29.) The question in all the cases depends upon the declared or presumed intentions of the donor. When a legacy is given for a particular purpose specified in the will, and the testator, during his life, accomplishes the same purpose, or furnishes the intended legatee and beneficiary with money for that purpose, the legacy is satisfied. (1 *Roper*, 365. *Debeze v. Mann*, *supra*. *Rosewell v. Bennett*, 3 *Atk.* 77. *Carver v. Bolles*, 2 *R. & M.* 301. *Trimmer v. Bayne*, *supra*.) In this case the purpose and object of the legacy; as expressed in the will, and the purposes for which the money was given by the testator, in his lifetime, were the same, to wit, to do for his son Orlando what he had done for each of

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his other sons, aid him to the amount of two thousand dollars in the purchase of a farm. The provision for the family or heirs of Orlando was incidental and contingent, and gave to the plaintiffs no vested right in the portion. The reference to the heirs of Orlando in the will and in the provisional arrangement for a conveyance of the farm to them by the executors, in case of the death of Orlando before he should become entitled to the conveyance, is no evidence of an intent on the part of the testator to give to Orlando the sixteen hundred dollars as a bounty, in addition to his portion. In *Carver v. Bolles*, (*supra*,) the portion by will was secured to the children of the legatee, (a daughter,) after her death, she having but a life estate in it, and yet it was held adeemed by an advance of a large part of the amount to the daughter, absolutely, upon her marriage, and the conveyance of the residue upon the trust of the marriage settlement, differing entirely from the trusts of the will. The testator in framing his will sought to make the legatee equal with his other daughters, whom he advanced in like amounts upon their marriage, and this intent was fully carried out by the provision upon the marriage. So here the prominent idea was equality among the children, and that was accomplished by the advance, after the making of the will, to aid Orlando in purchasing a farm. The court does not inquire whether the portion by the will is entirely and absolutely to the child, or whether the subsequent advance is in the precise form indicated by the will. The advancement not being a performance of a covenant or satisfaction of a debt, it is presumed to be a satisfaction of the portion, although differing in some of the circumstances from the provisions of the will. (*See per Lord Eldon, in Trimmer v. Bayne, supra.*) A stricter rule is observed as to the satisfaction of a covenant or debt. (*Clark v. Sewell*, 3 Atk. 98. *Monck v. Ld. Monck*, 1 Ball & Beat. 304. *Sparkes v. Cator*, 3 Ves 530.) The presumption upon the will was that the advancement was intended in satisfaction of the portion, and the

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onus was upon the plaintiffs to overcome that presumption by showing a different intent. Parol proof was competent, not to vary the terms of the will, but to establish the acts and intents of the testator, either in behalf of the plaintiffs in rebutting the presumption of satisfaction, or of the defendants in reply to such evidence in support of the alleged satisfaction. (*Langdon v. Astor's Ex'rs*, *supra*. *Williams v. Crary*, 4 *Wend.* 443. 2 *Williams on Executors*, 827.) The note or receipt taken upon the advance of the principal sum, rather strengthens the presumption contended for by the defendants. It was an acknowledgment of the receipt of fifteen hundred dollars, which Orlando was "to account for without interest." Orlando had been intemperate and imprudent, and the very form of the voucher indicates, not a loan, but an advance in a way to give the donor a control or influence, to some extent, over the son, in place of that absolute control which the executors were to have in the use and appropriation of the legacy for his benefit. The purpose of the father was not to make the son his debtor, but by a discreet and prudent advance of the portion during his own life to encourage and help on the unfortunate son, and enable him to provide for himself and his family, and dispense with the tutelage of the executors. There was no provision to pay, or terms of payment fixed, and no security asked or given. It was an advance of a trifle less than the portion, and for the same purposes for which the portion was set apart and appropriated; and the voucher was taken in reference to it, and the accounting, in the minds of the parties, was an abatement of the legacy *pro tanto*. All the circumstances and acts, as well as the declarations of the parties, confirm this view of the case, and the judgment of the referee must be affirmed with costs.

[ONONDAGA GENERAL TERM, April 7, 1863. *Allen, Mullin, Morgan and Bacon*, Justices.]

ELI P. FISH *vs.* GILBERT B. FISH.

Under the statute against champerty, which makes every grant of lands absolutely void if at the time of the delivery thereof such lands shall be in the actual possession of a person *claiming under a title* adverse to that of the grantor, the possession must not only be adverse, but it must be under some specific title which, if valid, would sustain the claim. A general assertion of ownership, without reference to a particular title; or relying upon a title which would not entitle the party to the possession; is insufficient.

Distinction between the statute regulating and defining *adverse possessions* and prescribing their effect in quieting titles and limiting actions, and that against *champerty*, and the cases arising under them.

The objects of the two acts were different. The one was to quiet titles and terminate disputes, and the other was to prevent the transfer of disputed titles; and hence the difference in their phraseology.

To avoid a deed given by one out of possession, the party in possession must hold adversely "*claiming under a title*," and not "*under claim of title*."

A title which the defendant has conveyed to the plaintiff's grantor cannot be a title in him under which he can set up an adverse possession to avoid a deed by his own grantee.

A certificate given to the purchaser at a tax sale, by a municipal corporation, entitling him to a deed at the expiration of a year, unless the premises shall be redeemed, but not giving him the possession or the right of possession, and not professing to transfer the title, does not constitute a title under which the holder can claim an adverse possession.

EJECTMENT for a house and lot in Syracuse, tried before a referee. The plaintiff proved title in himself derived from the state through several mesne conveyances, including a conveyance from the defendant, the last link in the chain being a deed of conveyance from a prior owner, one Andrew J. Fish to himself, dated August 12, 1859. On the 4th of January, 1839, the defendant had conveyed the premises to one Aaron G. Fish, under whom the plaintiff derived title, and from that time he occupied the premises under his grantee, Aaron G. Fish, and those who succeeded to his title, as a tenant, for many years, and with short intervals upon one or two occasions up to the time of the trial. No rent had been paid for some years, but the defendant at no time surrendered the possession of the premises

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to his landlord or disclaimed to the party entitled holding as tenant, but he claims to have asserted title in himself, on different occasions, since 1854. In August, 1854, the premises were sold for the term of one hundred years, for a tax of \$8.39 assessed by the city of Syracuse in 1853, and were purchased by one Hudson, who received a certificate entitling him to a deed at the expiration of one year provided the proper notice was given, and unless the premises should be redeemed according to law. November 27, 1854, Hudson assigned the certificate to Thomas Spencer; and it was claimed and some evidence was given that it was bought by Spencer at the request and for the benefit of the defendant. The defendant, prior to his conveyance by warranty deed to Aaron G. Fish, had acquired title to the premises by deed from Oliver Teall, and the referee dismissed the complaint on the ground that at the time of the conveyance to the plaintiff the defendant was in possession under his deed from Teall and also under the tax sale, and therefore the deed to the plaintiff was void. From this judgment of dismissal the plaintiff appealed.

C. Andrews, for the appellant.

B. Davis Noxon, for the respondent.

By the Court, ALLEN, J. The learned referee fell into the prevalent error of confounding the adverse possession under claim of title, which will avoid a deed of the premises as champertous, with the adverse possession which will ripen into a title by lapse of time and without entry or action at the suit of the true owner. The statute against champerty (3 R. S. 5th ed. § 167) makes every grant of lands absolutely void, if at the time of the delivery thereof such lands shall be in the actual possession of a person *claiming under a title* adverse to that of the grantor. The possession must not only be adverse, but it must be under some specific title

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which, if valid, would sustain the claim. A general assertion of ownership, without reference to a particular title, or relying upon a title which would not entitle the party to the possession, is insufficient. The statute regulating and defining adverse possessions, and prescribing their effect in quieting titles and limiting actions, is essentially different in its terms from the act against champerty, referred to. (See 3 R. S. 5th ed. 503.) The distinction between the two acts and the cases arising under them is considered and pointed out very clearly by Selden, J. in *Crary v. Goodman*, (22 N. Y. Rep. 170.) The objects of the two acts were different. The one was to quiet titles and terminate disputes, and the other was to prevent the transfer of disputed titles; and hence the difference in their phraseology. To avoid a deed given by one out of possession, the party in possession must hold adversely "claiming *under a title*," and not "under *claim of title*." The general assertion of claim by the defendant here may perhaps have been sufficient as "a claim of title," under the statute of limitations, but it was not a "claim under a specific title," within the act against champerty.

He could not claim under the deed from Teall, for the reason that he had conveyed that title with warranty to Aaron J. Fish, under whom the plaintiff took his title. That certainly was not a title adverse to that of Norton, the plaintiff's grantor. It was in truth the same title under which he held the premises, and the title which the defendant had conveyed to the plaintiff's grantor could not be a title in him under which he could set up an adverse possession to avoid a deed by his own grantee.

The tax certificate did not constitute a title under which the defendant did or could claim an adverse possession.

1. The title to the certificate was not in him, and the legal interest represented or conferred by the certificate was in Spencer and not in the defendant. His equitable interests, whatever they were, did not constitute a title under

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which he could claim adversely, so as to avoid a deed of the owner out of actual possession.

2. The certificate gave to no one the possession or the right of possession, and did not undertake or profess to transfer the title to the premises. Upon certain conditions, and after the lapse of the time mentioned by its terms, the holder might become entitled to and upon proper application acquire the title to the term sold. But that title has never been acquired, by the defendant or any one else. It follows that the defendant did not, at the time of the deed from Nelson to the plaintiff, hold adversely, "claiming under a title adversely to that of the grantor;" and the judgment must be reversed and a new trial granted; costs to abide the event.

[ONONDAGA GENERAL TERM, April 7, 1863. *Allen, Mullin, Morgan and Bacon*, Justices.]

CORNELIA LEE vs. ROBERT L. DILL and others.

Representatives of a deceased person are real or personal; the former being the heirs at law, and the latter, ordinarily, the executors or administrators. The term "representative" includes both classes.

There is no reason in the language of section 399 of the code as amended in 1860, the grounds of the exception therein, or the situation and condition of parties, authorizing a distinction between the different classes of representatives of a deceased person, in construing, applying and carrying into effect the provision of law contained in that section.

Accordingly *held*, that upon an issue at law between the heir at law and the devisee, of a decedent, as to the due execution of a will by the decedent, and as to his competency to execute the same; the question being between those two claimants, which is the best entitled to the property, the one by descent, or the other by purchase; the devisee is not a competent witness to testify to transactions between the testator and himself, tending to establish the will.(a) *BACON*, J. dissented.

(a) See *Spalding v. Hallenbeck*, (ante, p. 79,) *contra*.

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UPON an appeal from a decree of the surrogate of Onondaga county admitting the will of Samuel Dill to probate, as a will of real and personal property, the order and decree was reversed and issues ordered to be tried at a circuit court in Onondaga county. The issues came on to be tried before BACON, justice, in May, 1861, and evidence was given by the contestants respectively, touching the questions submitted to the jury; to wit, whether the testator, at the time of the execution of the will, understood its contents and effect; and 2dly, whether the will was proved to have been executed by fraud or undue influence practiced by Robert L. Dill. The testator was over ninety years of age, blind, somewhat deaf, and in impaired health, and lived in the same house with his son, Robert L. Dill, who had charge of his business and property. The testator left him surviving but his children, the appellant Cornelia A. Lee and the respondent Robert L. Dill. Evidence was given tending to show the intent of the testator to make them equal in the distribution of his estate, which evidence was sought to be met by proof that the testator upon hearing what R. L. Dill alleged to be true, but which was denied, that his daughter Mrs. Lee had been equally interested with her brother, R. L. Dill, in an adventure that had proved disastrous, and in the closing up of which about \$9000 had been paid by the testator and charged to R. L. Dill as a part of his portion, had determined to deduct one half of this amount from the portion of Mrs. Lee. The evidence of this consisted mainly of declarations of the testator as proved upon the trial. The evidence was that the division of the estate between the two children was very unequal in amount and value, and in addition to the inequality of value the share or portion of Mrs. Lee was put in the hands of R. L. Dill as trustee, and so limited as greatly to detract from its value to Mrs. Lee, and directly and indirectly to enure to the benefit of R. L. Dill. Robert L. Dill was offered as a witness, and objected to as incompetent, and the objection over-

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ruled, and he was sworn and examined as a witness. In the course of his examination he was permitted to testify, under objection made by the appellant, to conversations with the testator material and relevant to the issues, and tending to establish the will. The jury answered both questions submitted to them in favor of the respondents, and the judge before whom the issues were tried allowed a motion for a new trial. From that order Mrs. Lee appealed, and asked for a new trial, upon a case containing exceptions to the rulings and decisions and to the charge of the circuit judge.

D. Pratt, for the appellant.

A. J. Parker, for the respondent.

ALLEN, J. There can be no doubt that the division of the estate in controversy by the will propounded for probate is grossly unequal. Mrs. Lee will be greatly the gainer by securing a division according to the laws of descent and distribution, while the respondent Dill will be to the same amount benefited, pecuniarily, by establishing the will. It is in effect a contest for the property of the decedent; the appellant claiming as heir at law and next of kin, and the respondent as legatee and devisee. The former claims by descent, and the latter by purchase. The appellant succeeds as heir at law and next of kin, unless the respondent can show a better title from the deceased, either by grant or devise; and in either case it is in hostility to the survivor by representation to the last owner, and depends for its validity upon the act of such owner in his lifetime. By the will the respondent seeks to overthrow the title of the heirs at law, and by the alleged testamentary act of the ancestor to divest them of the estate which would otherwise have descended to and vested in them, and transfer the same to the devisees and legatees named in the will. The respondent, in propounding the will for probate, asserts his claims under it

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and tenders an issue upon his title, and the appellant is a necessary party to the proceeding, and can only assert her title as heir at law and next of kin by contesting the probate. And the question in substance and effect is between these two claimants, whether the one or the other is best entitled, the one by descent or the other by purchase.

At common law Dill would not have been a competent witness upon the trial of the issues. His relation to the controversy, as a party, would have excluded him, aside from his pecuniary interest in the result, and his interest as devisee would have rendered him incompetent if he had not been a party to the record. The questions made upon his examination depend upon the construction of section 399 of the code as amended in 1860. By that section he was a competent witness in his own behalf. But while he was made competent as a witness he was subject to the general exception of the section, as it then stood, that a party should not be examined against parties who were representatives of a deceased person, in respect to any transaction had personally between the deceased person and the witness. The objection to his competency was therefore properly overruled. But he was permitted to testify notwithstanding the objection and exception of the appellant, to transactions and circumstances had personally between the deceased and himself. It was an indirect inquiry whether the will was that of the alleged testator or of the beneficiary Robert L. Dill; and the circumstances under which it was prepared and executed were suspicious.

Without referring in detail to the circumstances which made the evidence objected to relevant and necessary on the part of Dill, it is sufficient to say that it was regarded by him and was in truth important for him to prove that the will was prepared from and in accordance with directions and instructions proceeding from the testator. Without such evidence it is not probable that a verdict could have been obtained affirming the will as the will of the deceased.

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The title of the claimant (Dill) was under the will, and all the negotiations and preparations, and all the circumstances between him and his father, leading to and resulting in the will, were parts of the *res gestæ*, and entered into and made a part of the principal transaction by which Mrs. Lee was to be deprived of her rights as heir at law and next of kin. And it follows that every part of this transaction, and every material circumstance, must be proved by competent testimony. The party was allowed to testify that his father knew the contents of the will, and to follow it up by proof of what took place between himself and his father in personal interviews between them touching the will and preparatory to its being drawn, and that in such interviews the deceased told the witness how he should make it, and that he should make it as it was afterwards made; and that the provisions concerning Mrs. Lee originated with and were urged by the testator against the wishes and requests of the witness.

If Mrs. Lee in this contest was the representative of her deceased father, the admission of this evidence from the party to the proceeding, in his own behalf, was erroneous. Words and phrases, in statutes, must be deemed to have been used in their usual and popular sense, unless it appears from the context or otherwise that they have been used in a technical or restricted sense. A representative is one that stands in the place of another, as heir, or in the right of succeeding to an estate of inheritance; one who takes by representation. (*Webst. Dic.*) One who occupies another's place and succeeds to his rights and liabilities. Executors and administrators represent, in all matters in which the personal estate is concerned, the person of the testator or intestate, as the heir does that of his ancestor. (*Burrill's Law Dict.* 2 *Steph. Com.* 428.) Representatives of a deceased person are real or personal; the former being the heirs at law, and the latter, ordinarily, the executors or administrators. The term

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representative includes both classes. When the personal representatives alone are intended in a statute they are so named, and there is no intimation of an intent to limit the protection and benefit of this exception to the personal representatives. The "real representatives" are as much within the reason of the rule as the personal representatives, and there is as much reason for protecting the one class as the other.

As to the personalty, executors and administrators, although the usual are not the sole representatives of a deceased party. The next of kin, when they succeed to the personalty, whether through the intervention of the executors or administrators or in any other way, become the representatives *quoad* the effects distributed, and are within the protection of the statute. Other statutes recognize and provide for next of kin under the general term of "representatives," (3 R. S. 5th ed. 183,) and in wills and settlements the term representatives, and legal representatives, are frequently held to mean heirs and next of kin, and not executors or administrators. (*Barns v. Otley*, 1 M. & K. 465. *Robinson v. Smith*, 6 Sumner 47. *Walter v. Meeker*, *Id.* 148. *Colton v. Colton*, 2 Beav. 67. *Long v. Blackall*, 3 Vesey, 486.) The case of *McCray v. McCray*, (12 Ab. 1,) is cited as holding a contrary doctrine, and as excluding this case from the exception in the statute making parties to proceedings in surrogates' courts witnesses in their own behalf. That was decided by a divided court, was a case of peculiar hardship, (*see S. C.* 30 Barb. 633,) and the learned judge by whom the prevailing opinion was delivered did not, evidently, give the case that careful consideration which he is accustomed to bestow, and which deservedly entitle his opinions to great weight. I am quite certain that upon a reconsideration he will be of the opinion that there is no reason in the language of the act, the reasons for the exception or the situation and condition of parties, authorizing a distinction between the different classes of represent-

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atives of a deceased person in construing, applying and carrying into effect this provision of law.

I am satisfied it was that error to admit the evidence. The verdict must be set aside, and a new trial granted.

MULLIN and MORGAN, Justices, concurred.

BACON, J. dissented.

New trial granted.

[ONONDAGA GENERAL TERM, April 7, 1868. *Allen, Mullin, Morgan and Bacon, Justices.*]

THE PEOPLE *ex rel.* James B. Taylor and others *vs.* MATTHEW T. BRENNAN, Comptroller of the city of New York.

Where an officer of a municipal corporation undertakes to set at naught the corporate will, by refusing to execute or deliver the bonds of the corporation in payment of the price of lands purchased by the corporation, a *mandamus* is the appropriate and proper remedy.

The writ may also be applied for by the vendor who is beneficially interested in enforcing the contract, after a resolution has been passed by the common council directing the officer to carry out and complete the purchase; where the corporation assents to the making of the application by the vendor.

Where T. offered to sell to the city of New York certain property, either for cash or corporate bonds, and the corporation, by resolution, accepted the offer, the payment of the price to be made in corporate bonds; *Held* that this constituted an agreement whereby payment was to be made in bonds; and that there being no legal remedy other than a *mandamus*, by which the vendor could obtain the bonds, that remedy was appropriate.

In all cases where an officer of a corporation refuses to comply with the lawful directions of the corporate body, and a *mandamus* is sued out by the party for whose benefit and in whose favor the directions are given, with the consent of the corporate body, the party will be relieved in that manner, without being put to an action against the corporation, for a specific performance.

Where, on an order to show cause why a peremptory *mandamus* should not issue, the facts are admitted, or the excuse offered is insufficient, the court

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will, if the decision be in favor of the relator, direct a peremptory mandamus, without the previous issuing of an alternative writ. CLERKE, J dissented.

If the only material disputed fact does not, even conceding it to be as the defendant alleges, furnish any satisfactory cause against issuing the mandamus, it is unnecessary to direct an alternative writ for the purpose of having a trial respecting that fact.

Where by a resolution of the common council of the city of New York, the comptroller of the city was directed to carry out and complete a purchase of real estate on behalf of the city, by issuing the corporate bonds, for the purchase money; *Held* that it was no excuse for the non-performance of this duty, by the comptroller, that the vendors had no title to the land, but the title was already in the city.

Held also, that the fact that the title was derived from D. who had purchased the property from the city and had taken a conveyance of it while he was an officer of the corporation, and thus incapacitated to purchase from the city, would not excuse the comptroller from complying with the resolution.

A power in a municipal corporation to purchase carries with it a power to incur an indebtedness for the purchase money, and to provide for the payment of the indebtedness; unless that power is so restricted that it cannot be exercised unless there are sufficient funds in hand to pay for the property.

If the corporation of New York, on purchasing property, has no funds which can be appropriated to the payment of the price, it may purchase on credit, and may issue its obligations promising to pay the indebtedness at a future time, and make subsequent provision for their payment.

An order for a mandamus, which directs that the comptroller of the city of New York shall be required by such writ to procure the signature of the mayor, and the corporate seal to be affixed to bonds, is erroneous. The writ should only require the comptroller to do those acts which lie in his department, and are personal to himself, viz: the preparation of the bonds, and his own signature to them.

APPEAL by the defendant from an order made at a special term, awarding a writ of peremptory mandamus. On the 20th December, 1852, the common council of the city of New York passed a resolution, which was approved by the mayor, directing that "the land to be made on the North river, together with the bulkhead, between Gansevoort street and Twelfth street, be sold to D. R. Martin, or any other applicant, and that it be referred to the commissioners of the sinking fund to fix the terms and price of sale." On the 27th of December, 1852, at a meeting of the commissioners of the

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sinking fund, a resolution was adopted, as follows: "*Resolved*, That the price of the premises, as designated in the aforesaid resolution, be fixed at the sum of one hundred and sixty thousand dollars." It was then further resolved by these commissioners "that the comptroller be authorized to issue a grant for land under water, including bulkhead now built on the North river, between Gansevoort street and Twelfth street, extending to the exterior line of the city as now fixed, and containing the usual covenants, to Reuben Lovejoy, at the sum of one hundred and sixty thousand dollars, upon the terms fixed December 24, 1852, the grant for the same to contain a stipulation guarantying to the corporation the privilege of depositing coal ashes from the fifth, eighth, ninth, fifteenth and sixteenth wards in said premises, until the same are filled in." Lovejoy assigned his interest in the contract to Simeon Draper, then a governor of the alms-house, and directed the deed to be made out to him. On the 27th of December, 1852, the mayor, aldermen and commonalty of the city executed a grant or conveyance of said premises and delivered the same to Draper. Mr. Draper, simultaneously with such delivery, handed back to the deputy comptroller his bond and mortgage to the said the mayor, aldermen and commonalty, dated 27th of December, 1852, upon the said premises, to secure the sum of \$120,000, payable, &c., and also his, said Draper's, check for \$40,000, and executed a counterpart of said conveyance. Draper being one of the officers of the corporation, and thus incapacitated to purchase from the city, and the disqualification being discovered, Mr. Joseph B. Varnum was substituted as purchaser, in his place. On the 30th of December, 1852, the mayor, aldermen and commonalty executed and delivered to Varnum a new grant or conveyance of the same premises for the same consideration. Said premises were never put up or sold at public auction, and the only difference between the two grants above mentioned was that, in the first of them, the name of Simeon Draper, Esq. appears as the grantee, and in the

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second of them the name of Joseph B. Varnum appears as grantee. On the 30th of December, 1852, Simeon Draper and Frances S. his wife, executed and delivered a quitclaim of said premises to Joseph B. Varnum. On or about November 3, 1862, James B. Taylor, one of the respondents, addressed and caused to be delivered to the mayor, aldermen and commonalty of the city of New York, an offer in writing, to sell to the city the same property upon certain terms specified in the offer. On the 3d of January following the common council passed resolutions of acceptance, and directed the comptroller to carry out and complete the purchase, by the issue and delivery of the corporate bonds of the city for the amount of the purchase money. The resolutions had been previously vetoed by the mayor, but they passed both branches of the common council on the day above stated, notwithstanding the veto, no objection to the final action upon them being made. Afterwards Taylor caused a deed to be duly executed in accordance with the terms of the offer and resolutions, and on the 3d of February, 1863, he tendered the same to the comptroller and demanded the bonds. The comptroller refused to execute or deliver them, assigning but *one* reason for his refusal, which was, in substance, that the grantors named in the deed had not a good title, the title being already in the city. The substantial ground of objection being the appearance of Mr. Draper, in the transaction. Upon an affidavit setting forth these facts, an order was made by this court, on the 5th of February, requiring the comptroller to show cause why he should not be compelled by mandamus to issue and deliver the bonds. On the return of the order he appeared and submitted certain affidavits, deeds and other papers in support of his refusal to comply with the resolution. The court held that the facts thus presented constituted no ground for the comptroller's non-compliance with the directions of the common council, and made an order on the 24th of February, 1863, directing a peremptory mandamus to issue, "commanding him, as comptroller

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of the city of New York, forthwith to prepare the corporate bonds of said city in due form, for the aggregate amount of five hundred and thirty-three thousand four hundred and thirty-three dollars and fifty cents, in sums of not less than one thousand dollars each, payable to bearer, or to the order of the parties respectively entitled to receive the same, or to their representatives or assigns, and bearing date on the 3d day of February, A. D. 1863, the principal of which said bonds shall be payable in not exceeding ten years from the date thereof, with interest from that date at the rate of six per cent per annum, payable quarterly; that when said bonds are so prepared he, the said Matthew T. Brennan, shall duly sign the same as such comptroller and forthwith procure the same to be duly signed by the mayor of said city, and countersigned by the clerk of the common council, and sealed with the corporate seal of said city, and that he thereupon deliver the same to the said relators, James B. Taylor, Joseph B. Varnum and Douw D. Williamson, their representatives or assigns, in the proportion to which they shall be respectively entitled to the same, on their delivery to him, the said comptroller, of the deed mentioned in the affidavit, upon which the said order to show cause was granted."

John E. Develin, for the appellant. I. The relators, if they have any valid claim for this amount, against the city, have a perfect legal remedy by which they can recover and collect it. The pretended ordinance of purchase directs the comptroller to pay the purchase money, either in cash or by the corporate bonds of the city. He has refused to do either. The relators then may bring an action against the city, for the purchase money, and, if the sale and purchase be valid, they can recover. The legislature having made an appropriation to pay judgments against the city, the relators' remedy by action, if they have any rights, is complete. Or, they might collect their judgment against the city, by execution sale of its property.

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II. The corporation of the city of New York would, upon a proper showing, be entitled to a mandamus, to compel their officer (the comptroller) to obey their directions, and to carry into effect the requirements contained in their resolutions; but the relators are not entitled to the writ.

III. The issuing or refusal of a mandamus is, in some degree, within the discretion of the court; and when the writ would be unavailing, the court will refuse it, although a case for it be made out. (*Van Rensselaer v. Sheriff of Albany*, 1 Cowen, 501.) It is not within the power of the comptroller to execute the corporate bonds of the city. The seal of the city must be affixed to the bonds by the clerk of the common council, in whose custody the seal of the city is by law. (§ 36 of *Charter of 1857*.) The court, by its mandamus, directs that the comptroller shall execute the bonds. This order cannot, as a matter of course, be complied with by him. The clerk may refuse to use the seal, and he should therefore have been made a respondent. Under the above rule, therefore, regulating the issue of this writ, the court should not have granted it, as its issue cannot certainly afford the relief sought for by the relators.

IV. The corporation of the city has no power to issue bonds, other than bonds in anticipation of the revenue, without specific authority from the legislature. It is specially prohibited from borrowing money, (§ 33 of *Charter of 1857*, *ch. 446 of Laws of 1857*,) and the present proceeding is but an indirect mode of borrowing money to pay for this land, there not being any money appropriated for such a purpose, and the charter of 1857 not permitting any money to be paid out of the city treasury, except on a previous appropriation. (§ 31 of *ch. 446 of Laws of 1857*, p. 874.) The court will not permit, much less compel, a party, by indirection, to do an act which he is prohibited from doing directly.

V. The pretended ordinance accepting Taylor's offer, and directing the payment of the purchase money, is of no validity whatever. As appears by the certified copy of the pro-

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ceedings of the boards of aldermen and councilmen in this matter, this ordinance, after having been vetoed by the mayor, was passed by the councilmen on the 3d of January, 1863, and, on the same day, acted upon by the aldermen, *without unanimous consent*. This proceeding is in direct violation of section 37 of charter of 1857, which is in these words: "No ordinance which shall have passed one board shall be acted upon by the other board on the same day, unless by unanimous consent." The resolution to purchase is an ordinance within the meaning of this section, so far as the selection of the land and the limitation of the price are concerned. (*The People, &c. v. Lowber*, 28 Barb. 65, 71.) This proceeding, then, of the aldermen, in acting upon the ordinance upon the same day it passed the board of councilmen, was without authority, and against positive legislative direction, and therefore utterly invalid. No acceptance of the offer to sell has therefore taken place, and the relators, consequently, have under this ordinance no rights upon which to ask for the writ prayed for.

VI. The offer to sell these premises and the pretended acceptance imply, by the terms of each, that a good title was to be conveyed to the city by the relators. The rule of law, too, is that where one offers to sell a piece of real estate, and another accepts the offer, the latter will not be compelled to perform his part of the contract, unless the former can convey him the land by a good and valid title. This rule is applicable here; and it is submitted that neither the relators nor any of the parties under whom they claim ever had, or now have, a good and valid title to these premises. By the laws, ordinances, deeds, affidavits and proceedings of the commissioners of the sinking fund, before the court, it appears, beyond dispute, that the premises, or a very considerable portion of them, were conveyed to the city by the United States government and John L. Atherton, in the year 1850, and that they composed part of the real estate of the city. The real estate and the proceeds of the sales of it

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were pledged by the ordinances of the city, passed May 11, 1844, to the payment of the debt of the city, incurred for the introduction of Croton water. The commissioners of the sinking fund had no authority over the real estate of the city, so far as its disposal was involved, other than to sell it at public auction, (same ordinance.) This ordinance the legislature enacted, (*Laws of 1845, ch. 225, § 5,*) should “not be amended without the consent of the legislature first had and obtained.” *Such consent has never been obtained.* It appears by the authenticated proceedings of the commissioners of the sinking fund, in regard to their action concerning the sale of this property, that they never put it up for sale, or sold it, at public auction; but, on the contrary, agreed to sell it at private sale to Reuben Lovejoy for one hundred and sixty thousand dollars, to be paid forty thousand dollars in cash, and the balance, one hundred and twenty thousand dollars, by bond and mortgage on the premises, and authorized the conveyance of it to him, upon those terms. This act and proceeding was entirely in excess, and in violation of their powers as commissioners of the sinking fund, and void in toto. It is no answer to say that by the same ordinance the commissioners of the sinking fund were authorized to sell the land under water at a fixed rate. At the time of the passage of this ordinance the city did not own these premises, and, of course, could not have intended to fix the price at which it would sell what did not belong to it; and from the ordinance and the act by which the state conveyed to the city the land under water on the Hudson river, by which the former secured to the riparian owners the right to purchase the land under water, (*see Laws of 1837, ch. 182, §§ 3 and 4,*) it is evident that this part of the ordinance refers only to such lands under water as abutted against lands owned, not by the city, but by other parties, who, under the act, had the pre-emptive right. In this case there could be no use for a sale at public auction, for the pre-emptive rights of the owners of the upland would secure

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them against competition. The city was the owner in fee, as appears by the papers before this court, of both the upland and the land under water, and there was therefore no difference in their tenure—no reason for exempting either portion from sale at public auction, and consequently the duty of the commissioners of the sinking fund in respect to each was identical. In this view a conveyance to Lovejoy would have been void; but what shall be said of a conveyance to a party to whom the commissioners of the sinking fund had never agreed to sell or convey the premises, and he too a party prohibited by law from being interested in the purchase of any real estate belonging to the city? The first grant of this land was made on the 27th of December, 1852, to Simeon Draper, then one of the governors of the alms house. He paid in cash forty thousand dollars, and gave his bond and a mortgage on the premises for the sum of one hundred and twenty thousand dollars. At the time of this grant to him, there was a provision of law in existence in the following words, namely, “No member of the common council, head of department, chief of bureau, deputy thereof, or clerk therein, or other officer of the corporation, shall be, directly or indirectly, interested in any contract, work or business, or the sale of any article, the expense, price or consideration of which is paid from the city treasury, or by any assessment levied by any act or ordinance of the common council, nor in the purchase of any real estate or other property belonging to the corporation, or which shall be sold for taxes or assessments.” (*Laws of 1849, ch. 187, § 19.*) The court of appeals have since decided that Mr. Draper came within this prohibition, and that the conveyance to him was voidable. (*Roosevelt v. Draper, 23 N. Y. R. 318.*) Of course, a party holding property under, or by virtue of, a voidable deed, cannot convey a good title to it. No valid title to this land could therefore be transmitted from Mr. Draper, even though there did not exist the fatal defect, that the commissioners of the sinking fund sold these premises

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without authority, and never ordered them to be conveyed to Mr. Draper. On the same day, 27th of December, 1852, Mr. Draper made a conveyance of these premises to Joseph B. Varnum, to whom, on the 30th of December, 1852, three days afterwards, a new grant for them was made out and delivered by the comptroller, Varnum giving back his bond and mortgage to the city for one hundred and twenty thousand dollars, but paying no cash, nor was any cash, other than the forty thousand dollars paid by Draper, ever paid or received by the city, as part of the consideration for the conveyance of these premises to Draper or Varnum. It is impossible, therefore, to conclude but what Varnum either received the benefit of this payment made by Draper, or repaid the amount to Draper, so that in either event if there was really any purchase it was made by Draper, and Varnum took his interest either by the above conveyance by Draper to him or in fact. Varnum knew, or was bound to know, as were all his grantees, that Draper was an officer of the city government at the time of this purchase, if any, and therefore within the very words of the prohibition of the charter of 1849. Omitting the consideration and force of all other questions, this fact alone renders the deeds to Varnum and all his grantees impeachable, and therefore neither he nor they can convey any valid title to the premises.

J. T. Brady, for the respondents. I. The offer of Taylor to sell, and the resolutions of acceptance passed by the common council, constituted a valid contract between him and the city, binding him to convey the property, and the city to accept the conveyance, and pay the purchase price according to the terms of the contract. (1.) The offer was to sell the property to the city for the purposes of a market, and the resolutions accept the offer for those purposes, and no other. (2.) It was clearly within the scope of the corporate powers of the city to purchase the property for market purposes. The authority to make such purchases was conferred upon

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the corporation by the Montgomerie charter, and has never been taken away. (*Montgomerie Charter*, § 17. *Kent's Notes to City Charter*, p. 100, and n. 32, p. 254. *Charter of 1857*, § 54; *Laws of 1857*, vol. 1, p. 895. *The People v. Lowber*, 28 Barb. 65.) (3.) This authority is not, in any respect, taken away or limited by the act of 1853, restricting the power of municipal corporations *to contract debts*. (*Laws of 1853*, p. 1135.) The sixth section of that act expressly provides that nothing contained in it "shall be deemed to *alter, repeal or modify* any law now existing authorizing any municipal corporation to borrow money, contract debts, and issue bonds, obligations, or evidences of debt." The authority conferred upon the city by its charter to purchase property for market purposes, is *unaccompanied by any restriction as to the mode in which the power is to be exercised*. It therefore necessarily implies a right to enter into such obligations as may be essential to effect the object for which the power is conferred. (*Angell & Ames on Corporations*, 66. *The People v. Lowber*, *supra*. *Ketchum v. City of Buffalo*, 21 Barb. 294. *Barry v. Mer. Exchange Co.*, 1 Sandf. Ch. R. 280.) The city therefore possesses the power to contract a debt in the purchase of property for market purposes; and hence, in that respect, is excepted by the sixth section of the act of 1853 from the general provisions of that act. (4.) But even if this debt were not within the exception contained in the section above referred to, still the court must hold the resolutions in question to be unaffected by that act, because, 1st. There is *no evidence* in the case that *the debt created by the resolutions would increase the debt of the city beyond the amount specified in the third section of that act*. 2d. The debt is not a *funded* debt within the meaning of the fifth section, and therefore the provisions of that section do not govern the mode of contracting it. (5.) The resolutions were passed in the manner required by the charter. The objection made to their being acted upon

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in both boards on the same day was *withdrawn*, and they were therefore acted upon *by unanimous consent*. This was all that the charter required. (*Laws of 1857, vol. 1, p. 886, § 37.*)

II. The contract of sale was duly performed on the part of Taylor, and therefore the city became bound to execute and deliver the corporate bonds mentioned in the contract to the parties entitled to receive the same. (1.) By the terms of the contract the premises were to be conveyed by a good and sufficient deed, free and clear of all incumbrances except a mortgage held by the city, and all taxes and assessments upon the property. They were to be conveyed with all the water rights and privileges *as the same were conveyed to Joseph B. Varnum by the city by deed bearing date Dec. 27, 1852*, and the deed was to be executed by all the parties who appeared on record to be the owners of the premises, or any part thereof, by title derived from or through *Varnum*. (2.) The deed tendered to the comptroller conformed in every respect to the requirements of the contract, and no incumbrances are shown to exist, except those subject to which the property was to be conveyed. (3.) The *only* objection made to the deed was, *that the grantors had not a good title to the property*, or rather that *the title was already in the city*, and the grantors, therefore, conveyed nothing by their deed. This objection is entirely untenable, and forms no answer to a claim to performance of the contract by the city. It is founded, in part, upon an alleged interest of Simeon Draper in the original purchase from the city. But, conceding the facts to be just as claimed by the comptroller in his communication to the common council, or as they appear in the papers read in opposition to the motion for the mandamus, they do not support the objection, because, 1st. If the deed to Draper was absolutely *void*, then he took no title, and Varnum acquired a good title by the conveyance to him from the city. 2d. But if the deed to Draper was *voidable* only, then the title became vested in *him*, and Varnum acquired a good title

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through the deed from Draper. 3d. The deed from the corporation to Varnum vested the legal title in *him*, although the consideration may have, in part, been paid by Draper, and such payment did not and could not create any trust in favor of the latter. (1 R. S. 728, § 51.) 4th. The provision in the charter of 1849, (*Laws of 1849*, p. 283, § 19,) prohibiting any *officer of the corporation* from being interested in the purchase of any real estate from the city, does not declare that a conveyance by the corporation to *a person not an officer of the corporation*, shall be void if any of its officers shall be *interested in the purchase*. The sole design and effect of the provision was to make void any agreement or arrangement by which any officer of the corporation should endeavor to secure to himself an interest in any property conveyed by it. If, therefore, Draper did, in fact, advance any portion of the purchase money upon any understanding or agreement that he should have an interest under the deed to Varnum, the statute prevents him from enforcing that understanding. But it goes no farther. *It does not affect the conveyance*. But the facts are not as claimed by the comptroller, or as shown by the papers submitted in his behalf. The affidavits of Varnum and Draper explain the whole transaction, and clearly show that *the latter had no interest whatever in the purchase, and did not, in fact, contribute any portion of the purchase money*. It was also urged on the argument at special term, in support of the objection, that the proceedings to sell the property were not in conformity with the provisions of the statute, and, therefore, no title passed to Varnum. *It has been expressly decided otherwise by the court of appeals.* (*Roosevelt v. Draper*, 23 N. Y. Rep. 318.) The corporation is *estopped*, by the resolutions authorizing the purchase, from denying that the grantors had any title, for those resolutions distinctly *admit a conveyance of the property by the city to Varnum*. It is no answer to a claim to performance of the contract on the part of the city that it *has a better title to the property than the relators*.

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III. It is in the power of the city, through its appropriate officers, to perform its part of the contract. The issuing of the bonds is *the exercise of a power which necessarily results from the authority to purchase the property* and contract a debt; for every corporation having the power to contract a debt, must necessarily have the power to give its obligations in payment of the debt. (*State of N. Y. v. City of Buffalo*, 2 Hill, 434. *Barry v. Mer. Exch. Co.*, 1 Sandf. Ch. 280. *Ketchum v. City of Buffalo*, 21 Barb. 294. *Curtis v. Leavitt*, 15 N. Y. Rep. 62, 66.)

IV. The comptroller improperly refused to perform the duty imposed upon him by the resolutions of the common council, and, therefore, the mandamus was properly issued against him, because, 1st. The resolutions were within the scope of the corporate powers of the city, and were legally passed, for the reasons stated under the first point. 2d. The contract was duly performed on the part of the relators, and they, therefore, became entitled to the bonds. 3d. The objections to the deed were wholly groundless, as already shown. 4th. The resolutions leave no *discretion* to the comptroller to be exercised, except possibly that of determining whether the deed tendered was a good and sufficient one. But that relates to the *form* of the deed, and not to the question whether the parties *had a good title which they could convey*. In respect to the *form* of the deed, *no objection was made*, and, therefore, all the discretion vested in the comptroller must be deemed to have been exercised by him. 5th. The only matter left to his discretion having been determined by him in favor of the relators, the remaining duty imposed upon him was of a *purely ministerial character*. Therefore, even if there could be any doubt as to the title of the relators, he could not refuse performance of the duty enjoined upon him on that ground. The propriety of the purchase, in view of any doubt on that point, was a question for the common council to determine, and he cannot review or oppose their action. (*The People v. Flaggy*, 16 Barb. 503.)

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6th. To compel the performance of the duty thus enjoined upon the comptroller, a mandamus was the proper remedy. (*Ex parte Goodell*, 14 John. 325. *Hull v. Supervisors of Oneida*, 19 id. 259. *The People v. Collins*, 19 Wend. 56. *Ex parte Heath*, 3 Hill, 42. *Achley's case*, 4 Abb. 35. *The People v. Tremain*, 17 How. Pr. R. 10. *Crary's New York Practice*, 278, and cases there cited.) 7th. The relators have no other remedy to compel the delivery of the bonds.

V. There is not a shadow of pretext for any suggestion that this transaction is infected with fraud. The property was fairly sold and purchased with a knowledge of the purposes to which it was to be applied. The comptroller, in his communication to the common council, distinctly admits that the price was not unreasonable, and Mr. Taylor occupies only the position of one owning land, who having agreed to sell it, is seeking to compel performance by the purchaser of his contract, the seller doing all he agreed to do, and the purchaser having no reason for not performing.

BARNARD, J. The remedy by mandamus is both appropriate and proper in this case. An officer of the corporation undertakes to set at naught the corporate will. Surely the corporation must have some legal remedy to compel its subordinate to obey its lawful behests. It is impossible to conceive of any legal remedy adequate for the purpose other than a mandamus. Assuming that the corporation could have sued out the writ, is there any objection to allowing to the party who is beneficially interested in enforcing the corporate will expressed in his favor, the use of the same remedies which the corporation would be entitled to use? There does not appear to be any well founded objection, so long as the corporation assents to the proceeding being taken against the officer.

Now here we find no corporate act authorizing or directing the officer to be defended on behalf of the corporation.

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The assent of the corporation to this proceeding must therefore be presumed.

Again ; the party here has no other remedy at law. Three remedies have been suggested :

1. Specific performance. That is an equitable, not a legal remedy. The existence of an equitable remedy constitutes no impediment to the remedy by mandamus. (10 *Wend.* 395.)

2. Action for the price.

3. Action for damages for not accepting the conveyances.

The relator offered to sell the property either for cash or for corporate bonds. The corporation accepted the offer, the payment therefor to be made in corporate bonds. This constituted an agreement whereby payment was to be in bonds. There is no legal remedy other than mandamus by which the relator can obtain the bonds. The party is entitled to the payment of the price in the mode provided for, and he should not be compelled to accept any thing in substitution thereof, which would be the effect of a resort to any legal remedy other than a mandamus.

The fact that one has an action for damages for breach of official duty appears to have been conceded as forming no obstacle to the remedy by mandamus. Thus in the case of *The People v. Mayor &c. of New York*, (10 *Wend.* 395,) it was held that a mandamus would lie to compel the execution to the relator of a lease of property purchased by him on a sale for taxes. In *Van Rensselaer v. Sheriff of Albany*, (1 *Cowen*, 501,) a mandamus was issued compelling a sheriff to execute a deed to a redeeming creditor. In both of which cases an action for damages would lie equally as well as in the present. The issuing of these bonds is an official duty.

From motives of public policy the relator should not be put to an action for the price, or for damages, against the corporation. The corporation should not be compelled to pay the price in a mode other than that they have seen fit to designate, or to be mulcted in large damages, and should not be subjected to the expenses of a litigation because one of

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the corporate officers, without any authority, but of his own mere will, refuses to obey the corporate command. Nor does the law require, nor is there any propriety in requiring the relator to look simply to a money judgment against a person other than those he has contracted with.

As respects the equitable action for specific performance, although this forms no legal impediment to proceeding by mandamus yet, as a general rule, where a party has such remedy a mandamus should be denied. But in all cases where an officer of a corporation refuses to comply with the lawful directions of the corporate body, and a mandamus is sued out by the party for whose benefit and in whose favor the directions are given, with the consent of the corporate body, the party should not and will not be put to an action against the corporate body for a specific performance. There is no propriety or reason, in such case, for subjecting either the corporate body or the party to the delay or expenses of a suit.

With respect to an action for specific performance against the officer, it is, to say the least, very doubtful whether such an action would lie, as he is not a party to the contract. Even were it less doubtful there is no very substantial reason why an action against him should be resorted to, for enforcing the performance of an official duty of this character.

The next point for consideration is whether the court had power to order a peremptory mandamus without the previous issue of an alternative writ. The objection which is urged is that here are disputed facts which renders an alternative imperative. To this it is a sufficient answer that the parties below made no objection to the court adjudicating upon all the questions raised, whether of law or of fact, on the affidavits, and it was in fact so adjudicated by their consent. The counsel for the defendant does not make the point on this appeal. It was competent for the parties to waive the provisions of the statute. They having waived those provisions, it does not lie with any other person to raise an objection.

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As, however, this point has been insisted on with great earnestness, by counsel who was allowed to present his views as *amicus curiæ*, it is proper to consider the point in another light, viz: as to whether, admitting the disputed fact to be as the defendant alleges it to be, it forms an excuse to the defendant for not obeying the resolutions. If it does not, then there can be no necessity for a trial to ascertain what the fact is.

It is well settled by a long series of decisions that where on an order to show cause the facts are admitted, or the excuse offered is insufficient, the court will, if the decision be in favor of the relator, direct a peremptory mandamus. The present case falls within this principle. The only matters of fact alleged to be in dispute are: 1st. Whether Simeon Draper was interested in the original purchase of the property in question from the city; 2d. Whether he ever had any interest in the land; and 3d. Whether the title to the property was ever in him.

The second and third matters are wholly immaterial, except as evidence tending to show the first. There is no law preventing or affecting a purchase by or a title held by a city officer, from a third person, of land granted to that third person by the city; nor would the fact that a city officer had, at some anterior time, held the title to land which had by mesne conveyances become vested in the city, affect the title of a purchaser from the city of that land.

The only material disputed fact (if a fact can be said to be disputed when it is not distinctly controverted, but only inferentially by the statement of other facts which would admit of a construction either in consonance with or dissonance to the fact alleged to be in dispute,) is as to whether Simeon Draper was interested in the original purchase.

Now assuming the fact to be that he was so interested, (although the papers submitted on behalf of the comptroller do not distinctly allege such to be the case,) that fact affords no excuse for the refusal of the comptroller to comply with the resolution of the common council. It is said that the

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existence of this fact renders the conveyance to Draper and the conveyances to Varnum void; and this is said to result from the fact of Mr. Draper having been at that time one of the governors of the alms house. It is true that the judge who delivered the prevailing opinion of the court of appeals, in the case of *Roosevelt v. Draper*; (23 *N. Y. Rep.* 329,) in the course of his opinion, says that Mr. Draper, as such governor, was forbidden by the city charter to be concerned in the purchase; but in the same connection he intimates that the only party who could take advantage of that circumstance would be the city, to impeach the conveyance. It is, in that case, distinctly held that neither a corporator nor a tax payer can impeach the conveyance, nor can a creditor, unless the act done be such as to deprive him of his security to an extent which would hazard the realization of his demand. There is no other party who can act but the city. This decision was made in June, 1861. As yet the city has taken no proceeding to impeach the conveyance; on the contrary the corporate body, by the resolution in question and by not authorizing their officer to resist this application on their behalf, have ratified the transactions. For this reason the defendant cannot object, on the ground of any invalidity in the transfer of the property of the city, arising out of the fact of the alleged incapacity of Mr. Draper to be interested in the purchase.

Again; under the resolution all that was left to the comptroller to determine on was as to the form of the deed, as to whether it was executed by all the parties appearing on the record to be the owners of the premises by title derived from or through Joseph B. Varnum, and as to whether the property was free from incumbrances except taxes and assessments.

On all these points the comptroller was satisfied. He was not authorized under the resolution to inquire into any other matters. But granting that he could have gone to the extent of ascertaining whether the title of the property was such that the corporation would have a title thereto after the exe-

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cution of the deed, even then there was no foundation for a refusal, on this ground. The record title was clearly in the grantors named in the deed, and that title joined to the then existing title of the corporation, if it had any, gave the corporation a perfect title on the record; if it had no existing title then the deed gave it a title.

Viewing this alleged fact of the interest of Draper in connection with other facts, there will appear another reason why such interest formed no excuse for not complying with the resolution.

These other facts are that it was in dispute as to whether Draper was interested in the original purchase; and second, as to whether Draper came within the prohibition; for the decision in the case in 23 *New York Reports* turned on other grounds; and third, that other parties held the record title. A corporation has equal power and right as an individual to compromise a litigation, or any difficulty tending to litigation or any disputed title. When the resolution in question was passed it must be assumed that the corporate body knew the exact state of its title. The form of the resolution, and the fact that although the alleged defect in the title has been brought to their notice by the defendant, they have not authorized a defense to this proceeding on behalf of the corporation, show that they were aware of the state of the title, and that by the resolution they intended to compromise the vexed question existing between the corporation and the person holding a record title. The will of the corporate body to make the compromise having been declared by the resolution, it did not lie with the defendant to gainsay that will.

As then the only material disputed fact did not, even conceding it to be as the defendant alleged, furnish any satisfactory cause against issuing the mandamus, it was wholly unnecessary to direct an alternative writ for the purpose of having a trial respecting that fact.

But it is further urged that upon the admitted facts appearing on the papers, and assuming it to be the fact that

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Draper was interested in the purchase, the mandamus should not have been granted. And this is urged on three grounds :

Firstly. On the ground that by reason of various matters the grantors in the deed tendered had no title, but the title was already in the city.

Secondly. That there were various defects and informalities in the passing of these resolutions of purchase, and a want of power to pass them.

Thirdly. That the offer of the relator, and the resolution of the common council, did not create a valid contract, because the relator at the time owned only one third, and did not pretend and had no authority to contract for his co-tenants.

The matters relied on in support of the first ground are that Mr. Draper was interested in the original purchase ; that by the terms of the sale by the city, six per cent only was reserved in the mortgage ; and that the sale was not conducted in accordance with the provisions of the ordinances.

With reference to the interest of Mr. Draper, it is above shown that even assuming the fact to be, that he was so interested, that fact does not excuse the defendant. The papers presented on this appeal, however, do not show him to have been so interested. It is nowhere sworn to on behalf of the defendant that Draper was so interested ; but the inference is sought to be drawn from the fact that the deed was made to him and that he made the cash payment that was required. Mr. Draper, however, expressly and distinctly swears that he did not know the original purchaser (Mr. Lovejoy) before the purchase made by him, (Lovejoy ;) that he, Draper, had nothing to do with the city authorities, either directly or indirectly, in the purchase ; that he came into the purchase accidentally, and he details the manner in which, after the purchase was made from the city, by Lovejoy, he became interested therein.

This clear and positive statement must outweigh the mere inference to be drawn from the fact of the deed being at first

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given to Draper and of the payment made by him. It is not uncommon upon a sale of real estate, for the original purchaser to part with his interest to a third person in no way connected with the original purchase, and to have the deed pass directly to that third person.

So that whether the judge below decided on the ground that Draper was not interested in the original purchase, or on the ground that, conceding that he was so interested, that fact formed no excuse to the defendant, his decision in either aspect, so far as this objection goes, was correct.

Now as to the other matters relied upon in support of the first ground, the same line of reasoning which has led to the conclusion that an interest by Draper in the original purchase does not excuse the defendant, also leads to the conclusion that the rate of interest and the manner of conducting the proceedings on the sale by the city form no excuse to the defendant for not complying with the resolution. And as regards the proceedings for the original sale by the city, they are stated by the judge who delivered the opinion of the court of appeals in *Roosevelt v. Draper*, to have been perfectly regular and according to law, excepting only the reservation of six per cent instead of seven per cent interest, on the mortgage. Whatever effect that defect of the reservation of interest might have on the original conveyance by the city, it can only be taken advantage of *by the city*, in the same manner as the objection arising from Draper's interest can be taken advantage of. The same reasons which debar the defendant from setting up in answer to this application the fact of the interest of Draper also debar him from setting up the defect in the reservation of interest.

With respect to the second ground, it is alleged that the common council cannot enter into a contract by resolution, as in this case; because such an act is legislative, and the 11th section of the act of 1857 declares that any legislative act of the city must be by *ordinance*. Conceding the act in question to be legislative, yet the 11th section referred to

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expressly provides that every legislative act may be by ordinance, act or *resolution*. In what manner the resolution can infringe sections 28 and 38 of that act is not perceived.

It is further urged that the resolution violates section 37, in that after the veto of the mayor it was passed by both boards on the same day. The provision of section 37 is that no ordinance which shall have passed one board shall be acted on by the other board on the same day, *unless by unanimous consent*, &c. In this case there was unanimous consent.

It is further urged that the resolution directing the payment of the purchase money is of no validity, in consequence of the provisions of the 32d section of the act of 1857, which provides that the common council shall have no authority to borrow any sum whatever on the credit of the corporation, except in specified cases; and it is contended that a direction to pay in bonds is indirectly borrowing money, as section 31 of the act of 1857 does not permit any money to be paid out of the treasury without a previous appropriation.

The word borrow must be taken in its ordinary acceptation. The city cannot be said to borrow money by the issue of the bonds in question, any more than a man who buys goods and gives his note therefor can be said to borrow of his vendor, which can hardly be pretended. When it becomes necessary to pay the bonds, these provisions may be applicable.

The only question that can now arise is whether the corporation had power to contract a debt for the purchase money of the land. If it had power to contract the debt, the right and power to issue the obligation therefor follow as an incident, unless that incident has been expressly taken away by some positive statutory enactment. No such statutory enactment has been referred to.

Section 28 of the act of 1857 refers to the incurring of expense by the departments; section 31 to the drawing of money from the treasury; section 33 to the borrowing of money; and section 38 to work to be done and supplies to be furnished, and to the sale of property by the corporation. As

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to the act of 1853, it is only necessary to refer to the opinion delivered in *Ketchum v. City of Buffalo*, (21 Barb. 294.) That was a case of a sale of real estate to the city for a market and a payment of part of the purchase money by a city bond. The court, in the course of its opinion says: "This is a simple debt against the city, and as it does not appear that in creating it the common council exceeded the limitations contained in section 3, the evidence of the debt is not void according to section 2." (*Cited from page 307.*)

Now this property was purchased for market purposes. The corporation of the city of New York has full power to establish markets, and, as incident to that, to purchase a place necessary therefor. These are the views entertained by Justice INGRAHAM in *The People v. Lowber*, (28 Barb. 65.) The same views are entertained by the court in the case of *Ketchum v. The City of Buffalo*, (21 *id.* 294.) A power to purchase carries with it a power to incur an indebtedness for the purchase money, and to provide for the payment of the indebtedness, unless, indeed, that power is so restricted as that it cannot be exercised unless there is sufficient funds in hand to pay for the property. No such restriction can be found. If the corporation has funds which can be appropriated to the payment, the indebtedness may be discharged at the moment of its creation. If it has no such funds, then it may purchase on credit, and may issue its obligations undertaking to pay the indebtedness at a subsequent, future time, and make subsequent provision for the payment of them.

To the objection that the relator owned only a third in the land at the time of his offer, and that it does not appear on the papers that he had any authority to contract for the other owners, there are two answers: 1st. The extent of his ownership at that time is immaterial: it is sufficient if at the time when the deed was to be delivered he was able to tender a deed executed by the proper parties. 2d. The objection was not taken below, when it might have been obviated by

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showing an authority from the other parties. It cannot be taken on appeal, for the first time.

There is but one objection remaining to be considered, viz, that it is not in the power of the comptroller to execute the corporate bonds of the city. It is however within the comptroller's power to do those acts which lie with his department, and which are personal to himself, viz, the preparation of the bonds, and his signature to them. The order directing the peremptory writ to issue, so far as it directs that writ to command the comptroller to procure the signature of the mayor and the corporate seal to be affixed to the bonds, is clearly erroneous, and should in these respects be reversed.

In conclusion, it is to be observed that there is no allegation of any fraud in the original sale by the corporation, or in the purchase by it. The mandamus is resisted solely on the ground of alleged infraction of statutory law. These matters have been fully presented and considered; and the court is of opinion that, notwithstanding the objections arising out of these statutory provisions, the relator is entitled to have the price agreed to be paid.

No question is raised as to the necessity or wisdom of purchasing land for a market in this locality. Even if there had been, this court could not interfere. In the language of Judge INGRAHAM, "However unwise, improvident, extravagant or unnecessary a purchase a municipal corporation may intend to make, neither the attorney general nor any tax payer has, in my judgment, any right to interfere by action and by injunction;" and in the language of the court of appeals, "an act of administration likely to produce taxation, is an affair altogether public, and the only remedial process against the abuse of administrative power, tending to taxation, is furnished by the elective franchise, or a proceeding in behalf of the state; or in case of an act without jurisdiction, in treating the attempt to enforce the illegal tax as an act of trespass"

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The order, so far as it directs the comptroller to procure the signature of the mayor and the corporate seal to be affixed to the bonds, reversed; in other respects affirmed; with the modification that the comptroller, after having signed the bonds, shall deliver them to the relator on the receipt of the deed heretofore tendered, leaving it to the relator to have the other formalities observed which he may deem necessary.

SUTHERLAND, J. concurred.

CLERKE, J. (dissenting.) I suppose, as we intimated in *The People on the relation of Green v. Wood*, (35 Barb. 653,) that we should consider ourselves constrained, under the authority of *The People v. Flagg*, (16 Barb. 503,) to *entertain* the application in this case; the common council having ordered a specific act to be done by the comptroller, in order to complete their alleged contract with the relator. Although the relator, in that case, had his ordinary legal remedy against the corporation, the court granted the *mandamus* against the comptroller. The case now before us amply illustrates the danger of the principle upon which the decision in *The People v. Flagg* is founded, and of departing from the salutary rule that when a party has a plain and adequate remedy by an ordinary action, if he has any remedy at all, this extraordinary remedy by a writ of *mandamus* should not be extended to him. Where disputed facts and complicated legal questions are involved, justice can be more safely and conveniently administered by the ordinary course and practice of the law than by a resort to the method attempted in this case. At all events, it is quite evident to my mind that a peremptory *mandamus* ought not to have been allowed in the first instance. A case involving so large an amount of property and presenting a state of facts which, to say the least, were calculated to demand grave deliberation and inquiry, never should have been disposed of on affi-

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davits. To be sure it is said that the counsel for the comptroller did not object to this disposition of the case; but I think that this absence of a positive objection was not sufficient, and that, if the case was deemed a proper one, an *alternative* mandamus should only be issued; unless the counsel expressly stipulated to submit the question whether a peremptory mandamus should issue; and therefore I am satisfied, if the application be entertained at all, that an alternative and not a peremptory mandamus should be issued.

The order should be reversed, or should be so far modified as to direct that an alternative mandamus should be issued, so that a return may be made, giving to the relator an opportunity to plead or demur, and, if issues of fact are joined, that they may be tried before a jury.

Order modified and affirmed.

[NEW YORK GENERAL TERM, May 4, 1863. *Sutherland, Clerke and Barnard, Justices.*]

RENARD and others *vs.* GRAYDON and others.

An assignment for the benefit of creditors reserving nothing to the assignors and containing no provisions that the law holds sufficient to vitiate it, is not to be adjudged fraudulent and void because of a clause preferring certain creditors who had previously signed a composition deed agreeing to take fifty cents on the dollar and release the assignors; where it is found that the composition deed and the assignment were separate and distinct transactions, and were not part of one original plan or agreement, or to be construed with reference to each other.

APPEAL from a judgment entered at a special term, dismissing the plaintiffs' complaint. The action was brought by judgment creditors of the firm of Graydon, McCreery & Co. to set aside a general assignment made by them, dated, acknowledged and filed May 7, 1861, to John C

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Martin and John W. Graydon, claimed by the plaintiffs to make a fraudulent preference to Samuel Graydon, to whom they also alleged that Graydon, McCreery & Co. had made a fraudulent transfer of property, also sought to be set aside. The defendants were the assignors, assignees and Samuel Graydon. The grounds on which plaintiffs by their complaint claimed to set aside the assignment, were, 1. That there was no actual or continued change of possession of the assigned property. 2. That the assignors, in contemplation of their assignment, provided money to Samuel Graydon with which he purchased \$86,675.54 of their business paper from different creditors, at rates under 50 cents on the dollar, under an agreement with the assignors that he should purchase the same for their use, and be preferred for their benefit in the assignment for the full amount of such paper, and that he was so preferred. No evidence was offered to sustain the first charge. The second the plaintiffs modified on the trial, to the claim that Samuel Graydon, before the assignment, and after Gordon, McCreery & Co.'s failure, purchased their notes at a discount, which were preferred to him in full, and also secured by collaterals, which showed a secret trust on his part for the benefit of the assignors. The action was tried at the circuit before the court without a jury. On the trial the plaintiffs also contended that the assignment was fraudulent, because it preferred certain creditors, who had previously signed a paper, agreeing to compromise with the assignors at fifty per cent, payable at an average of twelve months, from April 1, 1861, and to release the assignors if they should eventually, by preference in an assignment, if the assignors should find it necessary to make one, or in any other way receive payment of the compromise.

The facts as found by the justice were as follows:

1. That the plaintiffs recovered the several judgments at the time, for the amounts against the defendants and the same were docketed and executions issued thereon to the sheriff of the city and county of New York, where said de-

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defendants resided, and returned unsatisfied as alleged in the complaint in this action. 2. That the defendants William Graydon, James Graydon, Thomas A. McCreery, George H. Seely and William A. Scott composed the firm of Graydon, McCreery & Co. at the time alleged in the complaint. 3. That creditors of said firm of Graydon, McCreery & Co. to the amount of over \$150,000 mentioned in Schedule B of their assignment, executed the following paper: "The undersigned, creditors of the firm of Graydon, McCreery & Co. in consideration of these presents and of one dollar to each of us paid, do hereby mutually agree to accept in satisfaction of our respective demands against that firm fifty per cent of the amount thereof to be paid at the average time of twelve months, (say six, nine, twelve, fifteen and eighteen months or dates equivalent thereto,) from the first day of April next. That all notes which we hold or control against them shall be deposited in the hands of William Watts, Esq. to remain until the said fifty per cent shall have been paid and then to be surrendered to Graydon, McCreery & Co. It is provided however that if the said Graydon, McCreery & Co. shall find it necessary to make an assignment or other general disposition of their property and shall secure the payment of the said fifty per cent of our debts, either by preference in such assignment (after confidential debts) or by turning out property or collaterals to secure the same, and if by such means we shall eventually receive payment to extent of said fifty per cent, then and without regard to the time above limited, such payment shall be in full discharge of our respective debts. Dated New York, March 7th, 1861." That the amounts for which such creditors are preferred by the said assignment, as stated in said Schedule B, are fifty per centum of the amounts for which such parties were creditors of Graydon, McCreery & Co. 4. That on the 7th of May, 1851, the defendants composing the firm of Graydon, McCreery & Co. executed an assignment to the defendants, John C. Martin and John W. Graydon, with certain schedules an-

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nexed, a copy of which is set forth in the complaint in this action ; that said assignment was afterwards and on the same day recorded in the office of the clerk of the city and county of New York. 5. That on the 25th day of May, 1861, the said defendants composing the firm of Graydon, McCreery & Co. made and filed in the New York county clerk's office an inventory or schedule according to the act passed April 13, 1860, entitled "An act to secure to creditors a just division of the estates of debtors who convey to assignees for the benefit of creditors," verified by the oaths of the assignors, according to said act, in which the debt of Samuel Graydon of \$86,675.54, preferred in said assignment, is set forth. 6. That many of the promissory notes of which the said debt consisted were purchased by the said Samuel Graydon of the holders thereof, respectively, some in the month of March and one lot on the eleventh day of April, 1861, before the execution of said assignment, at the rate of from thirty-five to fifty per cent on the dollar ; that none of such notes were purchased by the firm of Graydon, McCreery & Co. or either member thereof, and that the purchase of such notes was not, nor was the purchase of any or either of them for the use or benefit of, or made by or with money furnished by Graydon, McCreery & Co. or either of them, or on any agreement that they or any or either of them should be preferred in any assignment by Graydon, McCreery & Co. for the full amount thereof or for any amount, or that the same or any or either of them should be held by said Samuel Graydon in trust for the use of said Graydon, McCreery & Co. any or either of them. That said assignment was not made in pursuance of any agreement, that the said notes or any or either of them should be preferred therein ; nor was there any agreement between the said assignors and Samuel Graydon, that they would make an assignment preferring him to any amount or for any thing. 7. That the defendants William Graydon, James Graydon, John W. Graydon and Samuel Graydon are brothers ; that the defendants John W. Graydon and Samuel

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Graydon were members of the firm of Graydon, Swanwick & Co. and that the defendant John C. Martin is a brother-in-law of William Graydon and also married a niece of said William Graydon. 8. That the plaintiffs were respectively creditors of the defendants composing the firm of Graydon, McCreery & Co. as such partners at the time of the execution of said assignment for the debts for which they respectively recovered the said judgments against said defendants. 9. That the said instrument bearing date the 7th of March, 1861, and the said assignment bearing date the 7th of May, 1861, were separate and distinct transactions and were not parts of one original plan or agreement; that neither of said instruments entered into or formed part of or should be construed with reference to the other. 10. That the said assignment was not made by said Graydon, McCreery & Co. with intent to hinder, delay or defraud their creditors or the plaintiffs, or in trust for the use of the assignors, or by collusion with the assignees or said Samuel Graydon, and that the same was not fraudulent and void. The judge found, as conclusions of law: 1. That said instrument of the 7th of March, 1861, and the assignment of the 7th of May, 1861, are and were separate and distinct transactions, and that said assignment should not be construed with reference to the said instrument as entering into or forming part thereof. 2. That the complaint of the plaintiffs should be dismissed with costs, and that the defendants have an allowance of two hundred dollars.

C. Bainbridge Smith, for the appellants.

Walter Edwards, for Samuel Graydon.

Man & Parsons, for the other defendants.

By the Court, INGRAHAM, J. This action is brought to set aside an assignment. The ground upon which the plain-

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tiffs mainly rely is that the assignment prefers certain persons who had previously signed a composition deed, agreeing to take fifty cents on the dollar and release the assignors. The judge before whom the case was tried has found that the composition deed and the assignment were separate and distinct transactions, and were not part of one original plan or agreement; and that neither of said instruments entered into or formed part of, or should be construed with reference to, the other. He also finds that the assignment was not made with intent to hinder, delay or defraud their creditors, or for the use of the assignors, or by collusion. The complaint was dismissed, and the plaintiffs appealed.

There can be no doubt that the judge committed no error as to the law, if he is correct as to the findings of fact, in this case. The assignment, by itself, contains nothing that would render it void. It is a simple assignment for the benefit of creditors, giving preferences, and containing no provisions that the law holds sufficient to vitiate it. The only ground therefore would be to bring it within the case of *Spaulding v. Strang*, (36 Barb. 310,) in which the assignment was held void, in a similar case, but in which the judge found that the composition deed and the assignment were but one transaction, and were to be construed together. The difficulty in so holding in this case is that the judge before whom the case was tried has found otherwise. The question was one, mainly, of intent; and the testimony submitted to the court on the trial was such as left it to the judge to decide upon it as a matter of fact, so that his finding either way ought not to be reversed on appeal. It may be that the judge before whom this case was tried took a different view of the intent and motives of the parties from the conclusions of the judge in the case of *Spaulding v. Strang*, and yet it is no ground of appeal, any more than where juries differ as to the facts in cases very similar. It is only where the finding of fact is clearly against the weight of evidence that such findings should be disturbed on appeal.

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A difference of opinion upon the facts, by the appellate court, does not warrant us in reversing the judgment. I do not agree with the plaintiff's counsel that the evidence is conclusive against the defendants on this point, although I am free to say that from an examination of the evidence I should hesitate about coming to the same conclusion.

This difference of the finding of facts draws the distinction between the present case and that of *Spaulding v. Strong*, and renders the decision in that case inapplicable here. There the two instruments were found to be one transaction, to be construed together, and in this case they were found to be separate and distinct, and formed no part of each other. With this finding, we cannot say, as matter of law, that the assignment is void upon its face, or that it is to be declared void for any thing contained in the composition deed which the judge finds is not connected with it and forms no part of it.

The offer to prove what Samuel Graydon said, as to his object in buying up the notes of the assignors, was properly excluded. There was no offer to show that he was acting for them, in the matter, or under agreement with them. It was immaterial whether Samuel bought up the paper with a view of enabling the firm to compromise their debts, if the transaction formed no part of an agreement under which the assignment was executed,

The evidence of threats made by the assignors to their creditors to induce them to sign composition deeds was excluded on the trial, and is sought to be sustained upon the ground that no such charge is made in the complaint. Independent of this objection I should be of the opinion that such evidence was admissible, as tending to connect the composition deed with the assignment, and bearing upon the question whether they were or were not to be considered one instrument. The defendant had a right to know the grounds upon which the plaintiffs sought to set aside the assignment, and if they relied upon such threats, should have made the proper

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allegations in the complaint to warrant the introduction of the testimony. This is the only ground upon which the exclusion of the evidence can be sustained; and upon this point I entertain some doubt, but do not feel warranted on that account to set aside the judgment.

Judgment affirmed.

[NEW YORK GENERAL TERM, May 4, 1863. *Sutherland, Ingraham and Clerke*, Justices.]

 LEDELIEY vs. POWERS.

A married woman not being able to make a contract valid at law, so as to bind herself personally, if she has a separate estate and contracts debts for her own benefit, on the credit of it, it is just and right that a court of equity should enforce payment of the debts out of her separate estate. *Per SUTHERLAND, P. J.*

But where a married woman, on purchasing a farm as her separate estate, also purchased certain stock and farming implements thereon, and executed a mortgage of the chattels, to secure the payment of the price thereof, to the vendor, the payment of which chattel mortgage was guarantied by two other persons; *Held* that the vendor, by accepting the chattel mortgage and guaranty, must be deemed to have trusted to the same as his security for the payment of the price; and that, in the absence of any finding that the chattels were bought or the debt incurred for the benefit of the wife's separate estate, the same could not be charged with the payment.

APPEAL from a judgment entered at a special term, on a trial before the court without a jury. The action was brought to charge the separate estate of the defendant Millie D. Powers, a married woman, with the payment of \$629.50 and interest, being the price of certain farming stock and implements on a farm near Tarrytown, in the town of Mount Pleasant, alleged to be a part of her separate estate, which stock and implements were claimed to have been sold and delivered to her by the plaintiff, on the 31st day of October,

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1856. The justice found that the plaintiff was entitled to judgment against the defendant and her separate estate, for the amount claimed, with interest.

S. Sanxay, for the appellant.

A. J. Willard, for the respondent.

SUTHERLAND, P. J. This action was brought to charge the separate estate of the defendant Millie D. Powers, the wife of Edward J. Powers, with the payment of the sum of \$629.50, and interest thereon from the 31st day of October, 1856, the price of certain farming stock and implements alleged to have been sold and delivered to her by the plaintiff, on that day. The complaint alleges that at the time of the sale of the chattels the defendant promised and agreed to pay the \$629.50 on the first day of May, 1857, with interest, and, to secure such payment, executed a chattel mortgage of the chattels to the plaintiff. This chattel mortgage is set out in the complaint, and also a guaranty or security clause annexed thereto, signed and sealed by V. R. Terry jun. and Edward J. Powers, by which, in consideration of the sale and delivery of the chattels to the defendant, and of one dollar, they guarantied to the plaintiff the payment of the chattel mortgage, and covenanted and agreed, if default was made in the payment of the mortgage, that they would pay or make up any deficiency. The chattel mortgage, and the security clause, were on the trial put in evidence. The complaint also alleges that at the time of the sale of the chattels and the execution of the chattel mortgage, the defendant was seised and possessed of a farm in Westchester county, a farm in Orange county, and a farm in Columbia county, separate and independent of her husband, which farms are described in the complaint; that she had made default in the payment of the chattel mortgage; that the whole sum of \$629.50 was due and owing; and that in disregard of her chattel mortgage

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she had wrongfully sold, converted and disposed of the said goods and chattels to other persons, so that the same were beyond the reach of the plaintiff, and could not be found by him.

The defendant in her answer alleged that the plaintiff did not sell and deliver to her, on her separate account or at her request, the chattels; that she never possessed or had them; that she did not mortgage them, and had no right or property in them to mortgage; that she never made the promise alleged in the complaint, and never promised to pay the plaintiff the said sum of \$629.50, and never intended to charge her separate estate, or did charge it, on account of said chattels. She did not deny, in her answer, that at the time mentioned in the complaint she had and owned separate and independent of her husband, the farms described in the complaint.

The evidence on the trial at special term, was conflicting as to the execution of the chattel mortgage, and as to the sale of the chattels to the defendant. The defendant, who was sworn as a witness, testified that she had never authorized her husband or any other person to purchase the chattels; that she had never had them or disposed of them, and had never authorized her husband or any person to receive them, or to sell them. She did not deny that she signed the chattel mortgage; but she testified that she was told, when she signed it, that it related to real estate only, and that she signed it thinking so; that she did not read it, nor was it read over to her; that she signed it at the request of Mr. Powers, as a paper relating to real estate, and that believing it to be such paper she signed it. On the part of the plaintiff there was evidence tending to show that the defendant knew the nature and purpose of the chattel mortgage, when she signed it.

It appeared from the evidence of the plaintiff, who was sworn as a witness, that the sale of the chattels was negotiated through Mr. Powers, the husband of the defendant,

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who told the plaintiff that he was authorized to buy the chattels for her; that the chattels, when sold, were on a farm in the town of Mount Pleasant, Westchester county, which farm the plaintiff conveyed to the defendant November 1, 1856.

The justice who tried the case at special term found as matters of fact, that on or about the 29th day of September, 1856, the defendant, by the said Edward J. Powers, her agent acting by and with her authority, contracted with the plaintiff to purchase of him a certain farm of land, in the town of Mount Pleasant, in the county of Westchester, which contract was executed, and said farm of land was conveyed to the defendant as her separate property and estate, on or about the 1st day of November, 1856; that on or about the 31st day of October, 1856, the plaintiff sold and delivered to the defendant, and the defendant by her husband and agent received, the personal property in the complaint mentioned, which was then on the farm in the town of Mount Pleasant; that the price or consideration agreed to be paid by the defendant for such personal property was \$629.50, payable on the 1st of May, 1857, with interest from said 31st October, 1856; and that for securing such payment the defendant, on or about the last mentioned day, executed and delivered to the plaintiff the chattel mortgage set forth in the complaint; and that no part of said sum of \$629.50 had been paid.

The principal and material question presented by the appeal in this case is, whether the facts admitted by the pleadings, and the facts so found by the referee, authorized the conclusion of law to which the justice came, that the plaintiff was entitled to a judgment against the defendant and her separate estate, for the sum of \$629.50, interest and costs, and the judgment which was thereupon ordered and entered, providing for enforcing the payment of the same out of the separate real and personal estate of the defendant generally.

In my opinion they did not. The justice did not find as a fact that the defendant, by the execution of the chattel mortgage, intended to charge her separate estate generally;

nor is such an intention to be inferred, from the facts found and the admitted facts in the case. There is nothing in the chattel mortgage showing or declaring such an intention. Indeed I think it may be said that the transaction itself, as stated in the complaint, rebuts, or tends to rebut, an inference or conclusion that the defendant intended to charge her real property, described in the complaint, or her separate property generally. Her execution of the chattel mortgage, and thus charging the specific chattels covered by it with the payment of the \$629,50, and the acceptance of the chattel mortgage with the written guaranty of third parties of its payment annexed to it, by the plaintiff, show, or tend almost conclusively to show, that she did not intend to charge her separate estate generally, or any other property than the specific property mortgaged; and that the plaintiff trusted to the chattel mortgage, and the guaranty annexed to it, as his security for the payment of the money; and did not give credit to the defendant because she owned the farms described in the complaint, or had separate property generally.

The justice did not find as a fact that the chattels were purchased and the debt incurred by the defendant for the benefit of her separate estate, or any particular part or portion of it. He found that the chattels, at the time of their purchase, were on the farm at Mount Pleasant, which it would appear from the evidence and the finding of the justice was conveyed to the defendant by the plaintiff the day after the purchase of the chattels and execution of the chattel mortgage, and which farm, it was an undisputed fact in the case, the defendant had sold and conveyed before the commencement of this action. There was nothing in the case which would have authorized the justice to find that the chattels were bought, or the debt incurred, for the benefit of any separate estate or property which the defendant had at the time of the trial.

In the report of the case of *Yale v. Dederer*, when it was before the court of appeals the second time, (22 N. Y. Rep.

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461,) it is stated that a majority of the members of the court concurred in the opinion that the intention to charge the separate estate must be stated in the contract itself, or the consideration must be one going to the direct benefit of the estate. I doubt whether that case will be considered as having authoritatively settled that the aid of a court of equity in such cases shall be thus limited. But it was authoritatively decided in that case, the last time it was before the court of appeals, that where a married woman signs a promissory note as mere surety for her husband, a court of equity will not enforce its payment out of her separate estate, unless her intention to charge her separate estate with the payment of the note was declared in the note or contract itself. When that case was before the court of appeals the first time, it was said, (18 N. Y. Rep. 276,) that the obligation of a surety was "*stricti juris*," and that the contract of a married woman being void at law, there was no equitable liability, where she was a mere surety.

A married woman not being able to make a contract valid at law, so as to bind herself personally, if she has a separate estate and contracts debts for her own benefit, on the credit of it, it is just and right that a court of equity should enforce payment of the debts out of her separate estate. But we have seen that it was said, in *Yale v. Dederer*, when first before the court of appeals, that there was no ground for the equitable aid of the court, in behalf of the creditor, where the married woman contracted or signed as mere surety. It was said that in such case the creditor should be left to his remedy at law. So in the principal case, the plaintiff having taken the chattel mortgage and personal guaranty of third parties for the payment of his debt, I think a court of equity should leave him to his remedy by or under them. I do not think that on the facts found by the justice who tried the case, and on the conceded facts of the case, there is any equitable principle upon which a court should enforce the

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payment of the plaintiff's debt out of the separate property of the defendant generally.

The plaintiff has a remedy at law on the guaranty of payment annexed to the chattel mortgage. The guarantors could not set up as a defense that the chattel mortgage, as the contract of a married woman, was void.

The judgment appealed from, I think, should be reversed, and a new trial granted ; costs to abide the event.

INGRAHAM, J. concurred.

CLERKE, J. I concur, on the ground that the justice did not find, as matter of fact, that the debt was contracted for the benefit of the defendant's separate estate.

New trial granted.

[NEW YORK GENERAL TERM, May 4, 1863. *Sutherland, Ingraham and Clerke*, Justices.]

McMONNIES vs. MACKAY and LUSHER.

Where goods are bought by an agent who does not disclose the name of his principal, at the time of the purchase, the principal, when discovered, is liable to the vendor on the contract made by the agent.

Where an agent, on purchasing goods, although disclosing his agency, gives his own notes for the price, which are received by the vendor in payment, the principal is not liable for the purchase money.

If vendors deal with an agent as principal, and without any knowledge, inquiry or information as to his agency, taking the promissory notes of the agent in payment of the price of the goods, and the agent subsequently effects a compromise with the holders of the notes, by which the latter accept from him certain moneys and securities in full payment and discharge of the notes ; this will discharge the employer of the agent from all liability for the price of the goods purchased.

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APPEAL from a judgment entered on the report of a referee. The following facts were found by the referee : That the defendants, in April, 1857, agreed with Thomas McNair to purchase teas, and sell the same for him, as his commission merchants and factors, on a commission of $2\frac{1}{2}$ per cent for buying, and $2\frac{1}{2}$ per cent for selling with guaranty. That, in pursuance of that agreement, they purchased on his account, in April, 1857, 3540 half chests of tea, for which they paid \$17,998.75 in cash, and \$35,876.22 in their notes of various dates, payable at six months, which (at average time) became due on the 8th day of October, 1857; and in June and July, 1857, resold on his account 3489 $\frac{1}{2}$ chests of the same, on six and eight months' credit, for the net sum (over and above charges and commissions) of \$58,211, which became payable on the 2d of January, 1858; and on the 11th of May, 1858, resold the other fifty-one half chests (on six months' credit) for \$1095. That in June, 1857, they also purchased for his account, under the aforesaid agreement, 667 half chests of tea, for which they paid \$12,013.82 in their notes of various dates, at six months, which (at average time) matured December 15th, 1857, which they resold on his account in June, 1857, on a like credit, for \$8,877.60. That on or about the 19th of July, 1857, they also purchased on his account, and under the aforesaid agreement, 1188 half chests of tea, for which they paid \$24,660.25 in their notes of various dates, at six months, which (at average time) matured January 19th, 1858. That on or about the 19th of July, 1857, the said Thomas McNair also purchased from the defendants 449 half chests of tea for \$10,190.40, upon a credit of six months, which they also retained to sell on his account. That in September, 1857, the defendants, without the knowledge, consent or concurrence of said Thomas McNair, hypothecated the two last mentioned parcels of 1188 and 449 half chests of tea with Wilmerdings & Mount, auctioneers, in the city of New York, for a cash advance thereupon obtained by them thereon of

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about \$22,000; and such teas were held by said Wilmerdings & Mount, under such pledge, until September and October, 1858, when they were resold by them to repay such advance, at much less than the cost price. That in the fall of 1857 the defendants failed in business, and in April, 1858, succeeded in effecting compromises with the holders of the said notes, by which they obtained a deduction on the principal amount of the notes given by them upon said purchases of 3540 half chests of tea, and as of the day of their maturity, of \$9482—a deduction upon the principal amount of said notes given by them upon said purchase of 667 half chests of tea, and as of the date of their maturity, of \$3,604.18; and a deduction upon the principal amount of said notes given by them on the said purchase of the 1188 chests of tea, and as of the date of their maturity, of \$5,509.58. That the said several notes were, upon such compromise, surrendered, and the defendants were released and discharged by the holders thereof from all further claim thereon; that the defendants did not make any agreement with the holders or owners of said notes, or any or either of them, to pay the difference between the amounts of said notes and the amounts by them so paid, when or as soon as they were or could be in a condition to do so. That McNair, on the 5th day of April, 1857, had on deposit, in the hands of the defendants, the sum of \$8,052.30 principal, and the interest that had accrued thereon from August 7th, 1855, (when it had been originally deposited with said John M. Mackay,) to be held as a margin against any loss which should accrue to the said defendants in their said transactions on account of the said Thomas McNair. And the referee further found that the said Thomas McNair, by an assignment dated the 23d day of October, 1858, assigned and transferred to the plaintiff all his accounts, dues, debts and demands against the defendants, and that the plaintiff is the holder and owner of all the demands in the complaint mentioned. And the referee found, as matter of law, that

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the said Thomas McNair was, and the plaintiff as his assignee is, entitled to the benefit of the said compromises made by the defendants with the holders of the notes given by them upon the said two parcels of 3540 and 667 chests of tea; and that the defendants are not entitled, as against the said McNair, or the plaintiff as his assignee, to any credit for payments upon said purchases, beyond the amount actually paid by them over and above the sums allowed them on such compromise. That the defendants having, without the consent or concurrence of McNair, pledged the said two parcels of 1188 and 449 chests of tea with Wilmerding & Mount, for the advance made them thereon upon their own account, were thereby guilty of a conversion of said two parcels of tea to their own use, and were not therefore authorized to hold said McNair liable upon any of his previous contracts in respect thereto, or for any losses that occurred thereon. And he further found, as matter of fact, that the defendants were indebted to the plaintiff in the sum of \$24,976.38, and that the plaintiff was entitled to recover against the defendants that sum, besides costs, and the referee ordered judgment accordingly.

Wm. C. Barrett, for the appellant.

B. F. Mudgett. for the respondent.

By the Court, SUTHERLAND, P. J. The two important questions in this case were: 1st. Whether McNair should have been debited with the full amount of the notes given by the defendants, for the teas, or only with the amount paid or secured for such notes by way of compromise. 2d. Whether the pledging of certain parcels of the teas to Wilmerding & Mount, by the defendants, was a wrongful conversion of them to their own use, which released McNair from all liability for the subsequent losses on those parcels. The referee found in favor of the plaintiff on both of these questions.

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In view of the character and importance of these questions, the findings of fact by the referee are singularly meagre and incomplete. In view of the first questions, there are no findings on the questions of fact, whether the defendants in purchasing the teas disclosed the name of their principal; whether the notes were taken by the vendors in absolute payment; whether exclusive credit was given by the vendors to the defendants; whether, when the defendants effected the compromise with the holders of the notes, and the notes were surrendered, and the defendants released and discharged, the holders of the notes knew, or had been informed, that the teas had been bought by the defendants, as the agents or factors of McNair; whether the holders of the notes, with whom the compromise was made, were the original vendors of the teas to whom the notes were given. In the absence of any finding of fact on either of these questions of fact, it is hardly safe, and it is certainly difficult, to decide the first and most important question in the case.

If the defendants at the time of the purchase of the teas, did not disclose their principal, the latter was liable to the vendors of the teas, and remained liable when this action was brought, unless he was discharged from such liability by the compromise and surrender of their notes effected by the defendants after their insolvency. (*Waring v. Faverick*, 1 *Camp. R.* 85. *Beebee v. Robert*, 12 *Wend.* 417. *Kymer et al. v. Suwercropp*, 1 *Camp. R.* 100.) If at the time of the purchase of the teas the defendants *did* disclose to the vendors their agency, the notes of the defendants might have been received by the vendors in payment, and if so received, of course the principal never was liable. (*Hyde v. Paige*, 9 *Barb.* 150. *Pentz v. Stanton*, 10 *Wend.* 275. *Waydell v. Luer*, 3 *Denio*, 410.) But if, at the time of the purchase and giving their notes, the defendants did not disclose their agency, I do not see how the defendants' notes could have been received in payment by the vendors, as between the vendors and the principal.

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Upon looking into the evidence in the case it is quite apparent, I think, that the vendors of the teas dealt with the defendants as principals, and without any knowledge of, or inquiry or information as to their agency. I think, therefore, McNair the principal, was originally liable to the vendors for the price of the teas.

The question then is, whether McNair was not discharged from his liability by the compromise with the holders of the notes and the surrender of the notes, effected by the defendants subsequently. I think he was, even on the facts found by the referee, general as they are. The inference from these facts is, I think, that the defendants effected the compromise and got up their notes, with money and securities of third parties; that the holders of the notes received the money and securities in full payment and discharge of them. I do not see why the plaintiff in this action should be permitted to claim that this compromise proceeding was not a discharge as to McNair, of all liability for the price of the teas; particularly as upon looking into the evidence in the case, it appears that the holders of some if not the largest portion of the notes, with whom the compromise was made, were not the original vendors of the teas. It may be that the original vendors had received the full face of a part if not all the notes.

If the vendors of the teas had retained all the notes, and the compromise was effected with them as holders of the notes, and they received money and securities of third parties, from the defendants, in *payment* and discharge of the notes, the vendors thereby, I think, discharged McNair from all liability, *whether he was known or unknown to them as principal*. (*Story on Agency*, §§ 431, 440.)

The judgment therefore should be reversed and a new trial ordered, on the ground that on the facts proved by him, the referee came to a wrong conclusion on the first and most important question in the case.

Upon the other principal question in the case, whether,

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the pledging of certain parcels of the teas to Wilmerding & Mount was a wrongful conversion &c., it is not necessary to pass. It is fortunate that it is not necessary; for the findings of fact by the referee in view of this question, are also exceedingly meagre and defective. He should have found more particularly the facts and circumstances under which the pledge was made; particularly whether the defendants had any lien, and if any to what extent, on the goods pledged, for commissions or advances, or both.

It is plain from the whole case, that it was tried without a proper appreciation by the counsel or the referee of the importance of certain questions of fact above adverted to.

In my opinion the judgment should be reversed, and a new trial granted, with costs to abide the event of the action.

[NEW YORK GENERAL TERM, May 4, 1863. *Sutherland, Ingraham and Clerke*, Justices.]

WELLS vs. WILLIAMS and others.

In the absence of an express agreement to that effect, there is no liability on the part of contractors upon public works to pay to sub-contractors the 20 per cent reserved in the original contract, for the payment of laborers or mechanics who may be employed.

And a provision made by a contractor, in a contract between him and a sub-contractor, that he shall be entitled to retain in his hands a part of the earnings, as a protection against his liability to the persons employed by the sub-contractor, will not give to the latter, or his assignee, any right of action against the contractor personally, nor any lien on the fund itself.

Where a draft is drawn upon a fund in the hands of a third person and accepted by the drawee, this operates as a valid equitable assignment of the fund to the holder, and entitles him to hold it, as against all other persons not having a prior or a better equity.

APPEAL from a judgment entered upon the report of a referee. The following facts, substantially, appeared

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in this cause: The Nassau Water Company, incorporated in April, 1855, for the purpose of supplying Brooklyn with fresh water, made a contract with Henry S. Wells & Co. to construct the mason work of the aqueduct, which the former were building for the city of Brooklyn. Henry S. Wells & Co. made a sub-contract with the defendant S. A. Parkes, and one Dunham, to do a section of the work contracted to be done by them for the Nassau Water Company; the latter consenting to such sub-contract. Subsequently, Dunham assigned his interest to Parkes. The plaintiff and one George Judd then, with the consent of the Nassau Water Company and Henry S. Wells & Company, agreed with Parkes, the sub-contractor last mentioned, to do for him in performance of his sub-contract, all the mechanical and laborer's portion of his said work, including brick paving, walling, arches, centres, rubble work &c. at prices named in the agreement. On or about the month of April, 1857, the plaintiff and Judd entered upon the performance of the work as agreed by them, and performed the same to the satisfaction and approval of the chief engineer, and faithfully carried out their agreement, and paid all their workmen and laborers. It was claimed that by reason of their work, the plaintiff and Judd, under their agreement with Parkes, became entitled to receive of Parkes, over and above all payments, a balance of \$2071.40, with interest from September 1, 1858, which sum was assigned over to the plaintiff by Judd, and was due to the plaintiff, and the payment thereof he had demanded from the Nassau Water Company and from Wells & Co. Parkes, the sub-contractor, subsequently to making the contract with Judd and the plaintiff, and prior to completing it, without the plaintiff's and Judd's knowledge or consent, in effect assigned all his contract with Henry S. Wells & Co. over to the respondents, Williams & Potter, by drawing an order in January, 1858, on the 20 per cent retained back on the contract, and which would become due on its final completion. It further appeared, that in the

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contract with Henry S. Wells & Co. the Nassau Water Company reserved and retained 20 per cent of each monthly payment to a certain amount; and Henry S. Wells & Co. in the contract with Parkes, and the latter in his contract with Wells & Judd, also respectively reserved and retained 20 per cent of each monthly payment, to protect and render them harmless from any claims and demands arising against them from the failure of the contractor or sub-contractor to pay the mechanics and workmen employed on the work. The amount so retained by Henry S. Wells & Co. of the moneys due to Parkes, was between nine and ten thousand dollars, and the Nassau Water Company retained a much larger amount. The amount of Judd & Wells' 20 per cent retained in the hands of Parkes, was \$1780. Upon Parkes' refusal to pay, the plaintiff and Judd presented a bill of their work to Henry S. Wells & Co. and demanded payment of them also, which they refused to make. Subsequently Judd assigned his interest in the matter over to the plaintiff, who brought this action.

The relief prayed for was that the Nassau Water Company might be enjoined and restrained by an injunction order, from paying over to Henry S. Wells & Co. until the further order of this court, the amounts due or to grow due from them to the said Henry S. Wells & Co. under their contract of the 10th of June, 1856, or any part thereof, and that the said Henry S. and Charles Wells might be likewise enjoined and restrained from paying over to the said Parkes, or to his assignees, Williams & Potter, or to the defendant Foster, or to any of the said persons, or to any other person, until the further order of this court, the amount due or to grow due from them to the said Parkes, or any of the defendants under the said contract of February, 1857, or any part thereof, and that the defendants, other than the said Nassau Water Company, might be severally enjoined and restrained from accepting or receiving any portions or portion of the said amounts until the further order of the court and from

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doing any act or thing to prejudice the interest of the plaintiff in the premises, or to delay, defeat or hinder the recovery of his said claim. The plaintiff further prayed that it might be adjudged and decreed that he was entitled to and that he have judgment against the said Nassau Water Company, and against the said Henry S. and Charles Wells, and against the said Smith A. Parkes, for the said sum of \$2071.40, with interest thereon from the first day of September, 1858, besides the costs of this action. And also that it might be adjudged and decreed that his equity is superior to that of Williams & Potter, in payment out of said 20 per centum in the hands of Wells & Co., due on the contract of Smith A. Parkes, and that he is entitled to payment thereunto, in preference to any claim which the defendants Williams & Potter might have therein under their transfers from Parkes to them, and that the said Williams & Potter, or George N. Williams, might be enjoined and prevented from collecting from H. S. Wells & Co. on said orders or transfers, and the acceptance thereof, a sum equal in amount to the claim of the plaintiff herein, and his costs of suit, and for further relief.

The referee found the following as conclusions of law, to wit: *First.* That the plaintiff has no lien in law or equity upon the reserved twenty per cent held by H. S. Wells & Co. under the contract between them and the defendant Parkes, or Parkes & Dunham. *Second.* That the defendants Williams & Potter, by virtue of the arrangement made between them and Parkes, and the advances made thereunder and the accepted order dated 29th January, 1858, had a right to said twenty per cent superior to that of the plaintiff. *Third.* That the plaintiff was not entitled to maintain his action against the defendants, Williams & Potter, but as to them the complaint herein on the merits should be dismissed with costs.

D. & T. McMahon, for the appellant.

F. W. Burke, for the respondents.

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By the Court, MULLIN, J. Neither the Nassau Water Company, nor Henry S. Wells & Co. ever entered into any agreement with the plaintiff or the firm of which he was a member, by which they bound themselves to pay to the plaintiff or his firm the moneys demanded in the complaint in this action, or any part thereof.

The right to relief, then, must rest on some lien which the law gives the plaintiff, by which the court is enabled to seize upon the fund in question and apply it in satisfaction and discharge of such lien.

By the contract between the Nassau Water Company and Henry S. Wells & Co. the former reserved 20 per cent from the moneys payable to the latter, for work done and materials furnished under said contract, which was forfeited if the party of the second part failed to perform their contract; and it was further provided that should the employment of other persons or other neglect to cancel all debts for services to laborers and others increase the cost of the work, such moneys (the 20 per cent) should be applied to or be indorsed on account of that additional cost. It was further provided that none of the moneys received by the party of the second part should be applied to the payment of their debts or obligations until the laborers and men employed by them on this contract should have been paid whatever was owing them; and the parties of the first part might at any time require sufficient security that this obligation would be faithfully performed.

It was further provided in and by said contract, that if the parties of the second part should neglect or refuse to pay the laborers or mechanics or other persons employed by them, they obligated themselves to the party of the first part for any payment or costs which said party of the first part or the city of Brooklyn might have to pay, or from any payment or costs that they might be legally liable for by the laws of the state to the laborers or men employed, and which sums might be reserved from any moneys due to the party of the second part.

The contract between Welles & Co. and Parkes, and that

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between Parkes and the firm of which the plaintiff was a member, contains substantially the same provisions; and by neither is any provision made that any sub-contractor shall have a lien on the moneys due or to become due to his principal.

The Nassau Water Company in their contract with Henry S. Wells & Co., and the latter with Parkes, and Parkes with the plaintiff and Judd, prudently provided that if they, the parties of the first part in each contract, should be made liable to pay the laborers employed by the parties of the second part, the moneys so paid might be deducted from the 20 per cent reserved by each contract.

But we are not referred to any law of the state making any person other than the employer responsible to laborers. And such liability, if it existed, would not depend on whether a fund was reserved, but would be an absolute liability for wages, without regard to the state of the accounts between the parties.

Such a liability is created by the general rail road act. But the liability in such cases is in favor of the employees and not of sub-contractors. In the absence of legislation or of express agreement, there is no liability of either of the parties of the first part in these contracts to the persons employed by the other. And it seems to me quite obvious that a provision made by such parties that they shall be entitled to retain in their own hands a part of the earnings, as a protection against such liability, gave to the persons employed no rights of action against such parties personally; nor any lien on the fund itself.

There is not a provision in the contract between Parkes and the plaintiff's firm which can be tortured into the creation of a lien in favor of the latter on the 20 per cent reserved in his contract with Henry S. Welles & Co. or any other party or person. How it is possible under such circumstances, to assert a lien, I am utterly unable to discover.

But again, before the plaintiff's work under his contract

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with Parkes was completed, the latter had drawn his draft on this fund in favor of Williams & Co. and such draft had been accepted by Henry S. Wells & Co. in whose hands such fund was. This operated as a valid equitable assignment of the fund to Williams & Co. and entitled them to hold it as against the plaintiff and all other persons not having a prior or a better equity.

The plaintiff has never had an assignment of this fund, or an agreement to assign it. The 20 per cent reserved under his contract was in Parkes' hands, and Parkes alone was liable to pay it. The same per centage in the hands of Wells & Co. belonged to Parkes and was recoverable only by him, unless he assigned it to some other party or the law seized it for creditors and compelled its appropriation to them.

In no aspect of the case can I discover any ground on which can be based the relief sought in this case, and I think the judgment should be affirmed with costs.

[NEW YORK GENERAL TERM, May 4, 1863. *Sutherland, Clerke and Mullin*, Justices.]

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HICKS vs. CLEVELAND.

Goods were sold by G. to B. in New York, to be paid for on delivery at Milwaukee by B.'s acceptance of two drafts for the price, to be drawn on him by G. Before the property reached Milwaukee B. left that place, after instructing his agent to inform G. that he would not receive the same, and to return it to G. if it should arrive. The property reached Milwaukee, and drafts being drawn on B. for the price, they were returned without acceptance. *Held* that no title to the property vested in B., and that he had no interest therein which was subject to levy and sale on execution against him.

Held, also, that a sale of the goods by B. to another did not carry a right of action for a previous conversion; and that the purchaser could not maintain trover against the sheriff, without a demand.

THIS is an action of trover, brought by the plaintiff as assignee of one William C. Gardiner, to recover the value

39	573
45	567
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of a quantity of furniture, alleged to have been converted by the defendant in January, 1855. The defendant set up in his answer that the property in question belonged to Levi Blossom, and that he sold it under a judgment recovered by him against said Blossom, as he lawfully might. Blossom was a witness for the plaintiff, and swore that the property in question, which consisted of household furniture, was ordered by him from William C. Gardiner, of Beekman street, in New York, in July or August, 1854. That he, Blossom, then resided in Milwaukee; that the property was to be delivered to him at Milwaukee, and that he was to pay for it by bills at six months; that he did not receive the property; that he left the state before the property arrived. Before leaving he directed Mr. Charles K. Watkins to inform Mr. Gardiner that he would not receive the property, and to return the same to Gardiner when it should arrive; that he never gave any acceptances for said property, and was not at Milwaukee when the property arrived. Gardiner swore that the goods were to be boxed and sent to Milwaukee, to Blossom, to the care of James P. Williams, and *Blossom was to give his acceptance for the amount on delivery, payable in six months.* That he drew two drafts for the amount of the goods, and sent them to Blossom for acceptance, and *they were returned unaccepted in a few days after he sent them.* On the 27th of November, 1854, he learned that Blossom had left Milwaukee for California; that he wrote to Watkins to take possession of all the furniture, and to hold it as his property until further orders. This letter was written immediately on learning that Blossom had left Milwaukee. The defendant excepted to the reading of this letter, on the ground that the original was not produced. The claim was assigned by Gardiner to the plaintiff Hicks, in January, 1855, by an instrument in these words:

“This is to certify that I have, this eighteenth day of January, 1855, for and in consideration of one hundred dollars, assigned, sold and delivered into the hands of John S.

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Hicks, of the city and county of New York, my account against Levi Blossom, formerly of the city of Milwaukee, for the purchase of a large bill of cabinet furniture, amounting to \$1028.50, and said furniture itself; which lot of furniture has been seized by the sheriff of that county for the debts of the said Levi Blossom and sold for the benefit of certain of his creditors. It is further understood and agreed that the said Hicks is to assume the responsibility and expense of suit for the collection, if possible, of said claim, and appropriate the proceeds, if any, to his use and benefit."

The plaintiff did not prove any demand of the property after the assignment to him. The defendant's counsel moved to dismiss the complaint, which was denied, and exception taken. The defendant made due proof of the judgment in his favor against Blossom, and of the sale of the property by execution under it. The defendant's counsel asked the court to charge, *First*. That, inasmuch as there was no assignment by Gardiner to the plaintiff of any damages which he had sustained, by reason of any conversion of the property in question, the plaintiff cannot recover. The court refused so to charge, and the defendant's counsel excepted. *Second*. That the assignment of the account against Blossom, and of the furniture, did not carry with it the right to recover in the present action. The court refused so to charge, and the defendant's counsel excepted. *Third*. That the terms of the assignment in question were a ratification of the sale of the goods to Blossom. The court refused so to charge, and the defendant's counsel excepted. A verdict was rendered for the plaintiff, subject to the opinion of the general term, on a case to be made.

A. Spaulding, for the plaintiff.

Wm. Fullerton, for the defendant.

By the Court, MULLIN, J. The furniture in controversy in this suit was sold by Gardiner to Blossom for \$1028.50,

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to be paid for on delivery of the property at Milwaukee by accepting two drafts for that amount, to be drawn by Gardiner on him. After the agreement was made, and before the property arrived at Milwaukee, Blossom left Wisconsin, and instructed one Watkins to inform Gardiner that he would not receive the property, and to return the same to Gardiner if it should arrive. The property did arrive at Milwaukee, and the drafts were returned without acceptance.

Under these circumstances, it is quite clear no title ever vested in Blossom. He did not perform his contract, to entitle him to possession, and he expressly refused to accept the goods before their arrival, and directed a return thereof. Blossom had no interest in the goods subject to levy and sale on execution against him. The sheriff and all others intermeddling with the property were wrongdoers.

The goods being directed to Blossom, and no one asserting title to the furniture, the sheriff came lawfully into possession of it. A demand was therefore necessary to entitle Gardiner to maintain an action for the conversion. When he sold to the plaintiff he had, at his election, the right to follow the goods, or to sue for damages for the illegal conversion. He had the right to sell either or both of these claims, and the purchaser of the latter might sue without any new demand. But the purchaser of the property could not bring trover without a demand. This was the point determined by the general term, when this case was before it after the first trial of this cause.

The sale of the goods did not carry a right of action for a previous conversion.

The transfer to the plaintiff was, 1st. The account; and 2d. The furniture. Under neither did the plaintiff acquire the right of action for the conversion.

It was held in *Waldron v. Willard*, (17 N. Y. Rep. 466,) that an assignment by a consignor of all his interest in the goods, transferred to his vendee a right of action against the common carrier, for non-delivery under his contract. The

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only interest left to the consignor in that case was this right of action; and as it was the intent of the parties that the interest of the consignor, whatever it was, in the property, should pass, the right of action, being all the interest he had, must be held to pass, or the contract was a mere nullity. The principle does not help the plaintiff in this case. Gardiner had a right of action, which his contract does not convey, and the plaintiff has not perfected his right by a demand.

I am therefore of the opinion that the judgment must be reversed, and a new trial granted; costs to abide the event.

Judgment accordingly.

[NEW YORK GENERAL TERM, May 4, 1863. *Sutherland, Clerke and Mullin, Justices.*]

THE OCEAN BANK vs. DILL.

Where promissory notes, made and indorsed by D. & D. without any consideration whatever, as accommodation paper for S., to enable him to take up and renew other notes previously made and indorsed by D. & D. for his benefit, were delivered for that purpose to S. who diverted them from that purpose and transferred them to a bank, upon its agreement to surrender and give back to him certain notes of S. then held by the bank; but the bank afterwards refused to give up the notes of S. and claimed to hold the notes of D. & D. as general collateral security for the debt of S.; *Held* that no action could be maintained by the bank upon the accommodation notes.

• **A** PPEAL from a judgment entered at the circuit, on a trial before the court without a jury, and from an order subsequently made, at special term, denying the defendant's motion for a new trial. The action was brought upon two promissory notes, in the words and figures following:

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“\$636 $\frac{17}{100}$.

New York, April 13th, 1861.

Four months after date I promise to pay to the order of John Dill, Esq. six hundred and thirty-six $\frac{17}{100}$ dollars, value received, at the Merchants' Exchange Bank.

W. R. DILL.

[Indorsed] John Dill.

\$675 $\frac{12}{100}$.

New York, April 15th, 1861.

Six months after date I promise to pay to the order of John Dill, Esq. six hundred and seventy-five $\frac{12}{100}$ dollars, value received, at the Merchants' Exchange Bank.

W. R. DILL.”

[Indorsed] John Dill.

On the trial the making and indorsement of the notes, and the mailing of notice of non-payment to the indorser, were admitted. William R. Dill was examined as a witness, and testified that he was the maker of the notes in suit; that the defendant, John Dill, was his father; that the notes were entirely without consideration—accommodation notes delivered to James L. Schott, for the purpose of taking up other notes of the same character, made and indorsed for him by the witness and his father. James L. Schott testified: “I applied for the indorsement of these notes; I applied to both the maker and indorser and obtained the notes; they were without consideration, purely accommodation; neither of the Dills was indebted to me at the time; I handed the notes to Lucien D. Coman, who held some notes of mine that were past due; he agreed to give me back five notes of mine; this was, I think, a day or two after the date of the notes in suit—the latter part of April, 1861; I never got those five notes back; there was no other consideration for the transfer to Coman, except his agreement to give them back; two of these notes were for \$400 each, and the balance in the neighborhood of \$300.” At the close of the testimony the court stated that judgment must be given for the plaintiff, for want of sufficient proof that the defendant was liable on the notes

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intended to have been taken up with the notes in suit. The counsel for the defendant offered to produce the notes in question, and re-call and re-examine the witnesses to that point; but the court refused permission to do so. The court thereupon found and decided as matters of fact: 1. That the notes on which this action is brought were made by William R. Dill, the son of the defendant, John Dill, indorsed by said John Dill, duly protested for non-payment, and the indorser duly served with notice thereof. 2. That the said notes were so made and indorsed without any consideration whatever, as accomodation paper for James L. Schott, and as W. R. Dill alleged, for the purpose of taking up and renewing other notes before that time made by the said William R. Dill, and were delivered for that purpose to Schott. 3. That the said James L. Schott diverted the notes from the purpose aforesaid, and the same were, on the 17th day of May, 1861, received by the plaintiffs and entered in their accounts as collateral security for indebtedness of the said James L. Schott, to the said plaintiff, already existing, and consisting of promissory notes wholly unsecured. 4. That the plaintiff did not pay or give any new consideration for the transfer of the notes in suit, except forbearance as to time. It did not renew any of the notes of said Schott held by the bank at the time of the transfer, but said notes still remain in possession of the bank, and they were produced, at the trial, and offered to be surrendered. And the court therefore as matter of law adjudged and determined that the plaintiffs were entitled to judgment against the defendant for the sum of \$1253.02 and costs.

Waters & Cushman, for the appellant.

W. A. Coyrssen, for the respondent.

By the Court, MULLIN, J. The defendant is the accomodation indorser of the notes in question. There was no consideration for either the making or indorsing said notes. They were made and indorsed to renew other notes, but

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neither the defendant nor his son were parties to the notes to be renewed by the notes in suit.

Schott, who procured the notes in suit to be made and indorsed, was indebted to the plaintiff on five notes then held by the plaintiff. Coman acted for the bank, and called on Schott to give new notes in lieu of those held by the bank. Five small notes were given, and Schott, after procuring the notes in suit, presented them to Coman in satisfaction of an equal amount of his own notes held by the bank. On consultation between Coman and the president of the bank it was concluded to discount the notes in question and surrender the notes of Schott. The notes in suit were accordingly entered on the books of the bank, but no notes were ever surrendered to Schott. They were entered on the books as held as general collateral security for the account of Schott. The notes were not received on any such arrangement. The notes of Schott are retained by the bank, and thus the notes were and are without consideration. Had the notes of Schott been surrendered, or had the notes been received by the bank upon any other valuable consideration, I do not think the defendant would have had any defense. But the only consideration was the surrender of the notes, and no such surrender was made before suit brought.

The justice before whom the cause was tried finds there was no consideration for the transfer to the bank, unless it was forbearance to sue. No such consideration is alluded to by any witness, and no such consideration can be presumed.

The bank attempts to hold the indorsement of the defendant as collateral security for the debt of another, although the agreement by which the bank obtained it was that it should be taken in payment. The law will not lend its aid to accomplish any such purpose.

I am therefore of opinion that the judgment should be reversed and a new trial ordered ; costs to abide the event.

TITUS *vs.* HIMROD, survivor &c.

Damages sustained by the makers of a promissory note, in consequence of the breach of an agreement by the payees to apply the proceeds of a consignment of wheat to the payment of such note, cannot be set off nor made the subject of a counter-claim, in an action brought upon a subsequent note, given by the same makers, to the payees of the first, and transferred to the plaintiff after maturity; the first note having been collected, and the second being a new and independent security and resting on a distinct consideration.

APPEAL from a judgment entered upon the report of a referee, dismissing the plaintiff's complaint. The referee found the following facts:

John De Mott, in the year 1852, was engaged in consigning wheat to Jones, Himrod & Titus, a mercantile firm in the commission business in the city of New York, to be sold by them on his account, and upon which he received from them advances. To protect Jones, Himrod & Titus, De Mott had placed in their hands a promissory note for \$2500, signed by himself and Swarthout as security. This note fell due on the fourth day of August, 1852, and not being paid was duly protested. Before its maturity, this note had been negotiated by Jones, Himrod & Titus to Peter H. Titus, the plaintiff in this action, for value. About the 19th of October, 1852, De Mott consigned to the said Jones, Himrod & Titus, a boat load of wheat of about 2800 bushels, and by letter of that date, addressed to Jones, Himrod & Titus, informed them that the wheat was sent to meet the above note then under protest. By a letter dated the 22d day of October, 1852, addressed to De Mott, Jones, Himrod & Titus acknowledged the receipt of the above letter; agreed to apply the proceeds of the said wheat (if sufficient) to the payment of the said note. The wheat was sold on the 27th day of October, 1852, at \$1.08 per bushel, and on the next day, Jones, Himrod & Titus addressed a letter to De Mott apprising him of the fact and informing him that with the pro-

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ceeds of this wheat they would pay the note as directed and credit his account with the balance. The proceeds of the wheat were sufficient to pay this note. Jones, Himrod & Titus did not take up the note in question, but carried the proceeds of the said wheat to De Mott's credit on general account. At the time of these transactions Jones, Himrod and Titus were the holders of another note for \$2500, made by De Mott, with Swarthout as surety, and which would mature on the 13th of January, 1853. At the time of obtaining this note, Jones, Himrod & Titus agreed to renew the same at maturity. On or about the 13th of January, 1853, De Mott applied to Swarthout to sign his name as surety to another note for \$2500, in renewal of the one falling due on that day, informing him that the previous one, which had fallen due on the 4th of August, had been paid by the boat load of wheat above referred to. Swarthout relying on this assurance, signed the said note as surety, and the same was given to Jones, Himrod & Titus. The said note being the one upon which this action was brought. On or about the 21st of April, 1853, De Mott made an assignment to the defendant and one Eastman, of all his property, for the benefit of all his creditors, preferring in the first class of creditors the said Swarthout, for all moneys due to him, and for all liabilities incurred as his surety or for his accommodation, which should prove to be valid and subsisting claims and demands against Swarthout. The said Peter H. Titus, the holder of the note protested on the 4th of August, 1852, in an action brought by him upon said note, recovered a judgment therein in this court, against De Mott and Swarthout, on the 24th of February, 1854, for \$2948.65, and said judgment was afterwards paid by De Mott's assignees. The assignees made sundry payments to Jones, Himrod & Titus on the said note, dated January 13, 1853, and that firm, on the 28th day of May, 1856, transferred said note to Peter H. Titus, the present holder of the same. The defendant, as

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surviving assignee, has in his hands sufficient assets to pay the amount still remaining due on the said note.

Upon the foregoing facts, the referee found, as conclusions of law: *First*. That the agreement made by Jones, Himrod & Titus to take up the note indorsed by Swarthout, and which fell due on the 4th of August, 1852, was a valid and enforceable agreement by said Swarthout, and that by the failure of Jones, Himrod & Titus to perform said agreement Swarthout had a right of action against said Jones, Himrod & Titus. *Second*. That at the time of the execution and delivery of the assignment by De Mott, for the benefit of his creditors, the note in this action, signed by Swarthout as surety, and then being due and payable, was not a valid and subsisting claim in the hands of Jones, Himrod & Titus, as against the said Swarthout, and that said note having been transferred to the plaintiff in this action long after its maturity, and after the execution and delivery of the said assignment, it was taken and received by him subject to all the equities in favor of said Swarthout. That the assignees of De Mott, trustees for his several creditors, are entitled to have enforced in their favor any defense which Swarthout could have made if an action had been brought against him to recover the amount of the said note. And finally, for the reasons aforesaid, that the plaintiff was not entitled to the relief prayed for in this action. Wherefore he directed judgment that the complaint be dismissed with costs.

George Bowman, for the appellant.

John E. Seelye, for the respondent.

By the Court, MULLIN, J. This action is brought against the defendant as surviving assignee, under a general assignment made by John De Mott to Peter Himrod and John L. Eastman, to recover the balance due on a promissory note

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made by said John De Mott as principal and Ralph Swarthout as surety, for the sum of \$2500, to the order of Jones, Himrod & Titus, payable at the Bank of Commerce in the city of New York, at four months from date, and dated the 13th of January, 1853. The defendant, after admitting some and denying other allegations of the complaint, sets up by way of affirmative defense, that in March, 1852, the said De Mott and Swarthout made and delivered to Jones and others above named, a note for the sum of \$2500, payable at four months at the Bank of Commerce. The payees transferred the said note before maturity to the plaintiff in this suit, but such transfer was not known, until long afterwards, to the said makers, or to Eastman. That in October, 1852, Mott, the principal debtor, consigned to the payees 2600 bushels of wheat, to be sold and the proceeds applied in payment of the note of March, 1852. The wheat was received and sold, but the proceeds were not applied in payment of the said note. On the contrary, the plaintiff in this suit, who held said last mentioned note, prosecuted the same to judgment and collected the same from the assignees of Mott. The answer further alleges that said Jones and others have never accounted for the proceeds of said wheat, but are still indebted for the same, and that such proceeds were in their hands as a fund applicable to and which did extinguish the note on which this action is brought. It is further alleged that the note in suit was wrongfully transferred to the plaintiff, after maturity, for the purpose of defrauding certain creditors of said Mott. The answer sets up a counter-claim for certain property consigned to said Jones and others in October, 1854, amounting to \$50, and which Himrod and Titus, two of said firm, agreed to apply on said note.

In order to the better understanding of the case it is necessary to refer to some other facts proved on the trial. For some years prior to the giving of the note in suit, Jones, Himrod & Titus, merchants residing and doing business in this city, had been receiving property from De Mott, one of

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the makers of said note, who resided at Lodi, in the county of Seneca in this state, and selling the same on commission, and advancing to said De Mott on property so consigned. Jones and others were at all times, it would seem, during their dealing with De Mott, largely in advance to him. On the 12th of February, 1852, their account rendered shows a balance due to them of \$22,735.23, and on the 11th of January, 1853, the balance due them was \$22,926.83. In addition to the property consigned as security to the said Jones and others, De Mott assigned to them certain bonds and mortgages, and gave them notes signed by said Swarthout as surety. After disposing of all these collaterals, and applying all payments, there is still due to said Jones and others something over \$7000.

The defendant is one of the assignees of De Mott in the assignment made to them for the benefit of the creditors of said De Mott. By this assignment Swarthout is preferred for all sums for which he is liable for said De Mott, and it is conceded that if this note in suit is a valid debt against Swarthout, the defendant has ample means in his hands with which to pay it. The assignees have already made several payments upon it, the last on the 25th of November, 1854.

The referee dismissed the complaint on two grounds; 1st. That Jones and others, by failing to apply the proceeds of the wheat specifically consigned to pay the note of March, 1852, became liable to Swarthout for damages equal to the amount of the note, and as these damages were an equitable set-off in favor of Swarthout against the said Jones and others, and as the plaintiff acquired title after maturity, he took the note subject to such set-off; 2d. That the liability of Jones and others to Swarthout, for damages, may be treated as an additional fund held by Swarthout for his security; and the other creditors of De Mott, having only one fund to resort to for the payment of their debt, may require Swarthout who has two, to resort to the one which the other creditors have not, to obtain payment of his claim.

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The note of March, 1852, was a valid security in the hands of Jones and others at the time of its transfer to the plaintiff, De Mott owing them a very large amount at that time. The transfer to the plaintiff before maturity, of that note, made him a bona fide holder for value, and he held it discharged of defenses which might otherwise have been interposed to it had it remained in the payee's hands. As between them and De Mott, the note would have been paid on the sale of the wheat specifically consigned for that purpose. But when these proceeds were realized they did not own the note, and they neglected to pay it to the plaintiff. Payment of that note was enforced by due process of law. It may be conceded that Jones and others became liable to De Mott for such damages as he may have sustained by the neglect to pay and take up that note. But I am wholly unable to perceive how Swarthout acquired any interest in those damages. The contract, if there was one, was with De Mott alone, and passed by his assignment, to the defendant. Swarthout has never had any right of action against Jones and others. Neither do I perceive any connection between the notes of March, 1852, and January, 1853. The former was paid in full, and the latter is a new and independent security and resting on a distinct consideration. There is no mode by which the breach of contract of Jones and others, to pay the first note, can be made available against the note in suit. The damages for the breach of such contract were unliquidated and not the subject of set-off; and they are not set up by way of counter-claim. But if a counter-claim was properly set up it would not be a defense to this action. If the damages for the breach of the contract were available and established they should be applied in satisfaction of an equal amount of the balance due from De Mott to them, and not in satisfaction of the note in suit.

It seems to me that upon no principle of either law or equity can the plaintiff's claim be defeated upon either of the grounds taken by the referee; because, 1st. The damages are not the subject of counter-claim against the plaintiff, and

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2d. Swarthout has never repudiated his liability on the note, or in any way authorized the defendant to refuse the payment of the balance due on said note.

Having paid so large a part of the note after full knowledge of all the facts in the case, it is merely captious now to resist the payment of the balance.

The judgment must be reversed and a new trial ordered; costs to abide the event.

[NEW YORK GENERAL TERM, May, 4, 1863. *Sutherland, Clerke and Mullin*, Justices.]

THE PEOPLE *ex rel.* William Eagle vs. JOHN KEYSER, Register of the city and county of New York.

Where a mortgage is made to two persons, describing them as "executors," but the money is made payable to them or their personal representatives, it is the duty of the register to receive and *record* a certificate of the payment of the mortgage, duly executed by the surviving executor, on actual payment of the money to him.

APPEAL from an order made at a special term denying an application for a mandamus, directing the register of the city and county of New York to record a certificate of the payment of a mortgage. The mortgage was payable to two persons, describing them as "executors," but the money to secure which it was given was made payable to them or *their personal representatives*. The certificate was signed and acknowledged by the survivor of the two executors, on the actual payment to him of the amount due upon the mortgage.

By the Court, CLERKE, J. We decided, at the general term in May, 1862, (*The People v. Miner*, 23 How. 223,) that in cases where a mortgage is made to executors as such,

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and the money is made payable to them and *their survivors or successors, and not their personal representatives*, one of such executors may receive payment and satisfy the mortgage on the record, as well as all; and that the register should, in such a case, file and enter the satisfaction. In the case before us the mortgage is made to the mortgagees, describing them as executors, indeed, but the money is made payable to their personal representatives. If this was an application to compel the register to *satisfy* the mortgage on record, we presume, in conformity with the decision in *The People v. Miner*, we should be constrained to deny it. But the case before us is a motion to compel the register to record a certificate of the payment of a mortgage; which certificate was signed and duly acknowledged by the survivor of two executors, on the actual payment to him of the amount secured by the mortgage. Now, whether the payment to the surviving executor was valid or not, and whether the representatives of the deceased executor have or have not any claim or right under this mortgage, no one can be injured by the recording of the certificate. Every one interested can judge of its effect for himself. The register, by recording it, incurs no responsibility. He can only consider, as in any other case of recording an instrument, whether it is duly acknowledged or proved, and whether such acknowledgment or proof is properly certified.

The order of the special term should be reversed, and the writ should be granted, without costs.

[NEW YORK GENERAL TERM, May 4, 1863. *Sutherland, Barnard and Clerke, Justices*]

ABBOTT EDSALL, by his guardian Gilbert Pearsall, *vs.* GEO.
VANDEMARK.

A guardian ad litem cannot of his own mere motion, and without the order of the court, make an absolute settlement of the whole matter in controversy, so as to bind the infant.

THIS is an action brought by the plaintiff to recover damages for an injury caused by the alleged negligence of the defendant in driving a horse and sleigh against the plaintiff in the highway, by which the plaintiff was injured, and the sight of one of his eyes destroyed.

The defendant by his answer denied the allegations of the complaint, and alleged negligence on the part of the plaintiff, causing or contributing to the injury. And by a supplemental answer the defendant alleged that since his former answer was put in, to wit, on the 19th day of September, 1860, the said action had been settled by and between the defendant and the guardian, *ad litem*, for the plaintiff in this action, said plaintiff being an infant, and having prosecuted said action by his said guardian, by which settlement, in consideration of one dollar paid by the defendant to the said guardian, it was agreed by and between the said guardian and the defendant that the action should be discontinued on payment by the defendant to the plaintiff's attorneys of their taxable costs and disbursements in said action; and the guardian did thereby relinquish all claim and cause of action made by the plaintiff in said action against the defendant. And he averred that the plaintiff's costs and disbursements in the action were on the same day duly tendered to the plaintiff's attorneys, by the defendant, which tender had been from thence hitherto kept good, and the moneys to pay the same had been kept at all times ready to pay to the said plaintiff's attorneys the said costs and disbursements whenever they should choose to receive the same; and the same were now ready here in court for that purpose.

On the trial the defendant offered to prove that the cause

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had been settled by him, with the plaintiff's guardian ad litem in this action, as alleged in the supplemental answer. The plaintiff objected on the ground that the guardian could not settle the suit without leave of the court. Objection sustained, and the defendant excepted. The defendant having rested moved for a nonsuit, on the grounds, 1st. That no negligence was shown on the part of the defendant; and, 2d. That the evidence showed that the plaintiff himself was guilty of negligence, and that his negligence contributed to the injury complained of. Motion denied, and the defendant excepted. The judge then charged the jury on the law of the case; and the jury found a verdict for the plaintiff for \$475 damages.

Whereupon the court ordered that judgment be suspended, and that the defendant have thirty days to make and serve a case or bill of exceptions.

The defendant moved, at special term, that the verdict be set aside and a new trial granted. The motion was denied, and the defendant appealed.

T. Farrington, for the appellant. I. The action had been settled before the trial, and the justice erred in excluding the evidence of the settlement. The ground of exclusion was that the *guardian ad litem*, who made the settlement with the defendant, had no authority to make it without the consent of the court. This ground we contend is not tenable; but, on the contrary, the *guardian ad litem* had full authority *virtute officii*, to settle the suit. The action could not be prosecuted without the sanction and authority of the guardian. No attorney could even be employed without his authority. The attorney is the creature of the guardian, and derives all his power from him. The attorney is *subordinate* to the guardian, and has no power in the action not conferred by him. Has an attorney in the action power to settle the suit without leave of the court? (*See Gaillard v. Smart*, 6 Cowen, 385.) The court hold in that case that

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“an attorney may discontinue a suit in virtue of his general power as attorney on record.” *Paine & Duer*, (*Practice*, vol. 1, p. 198,) in speaking of the attorney’s authority, say : “An attorney cannot compromise the rights of his client, although it has been held that he may submit them to arbitration ; (7 *Cranch*, 436 ;) and he may give a cognovit ; (10 *John*. 221, 6 *Cowen*, 387 ;) or enter a remittitur *damna* ; (10 *John*. 221 ;) or a discontinuance.” (6 *Cowen*, 385.) Much more then may the guardian, by whom the attorney himself was created, do the same act ; settle or discontinue the suit. A guardian may submit an action pending to arbitrators on behalf of his ward, and such submission will bind the infant. (*Weed v. Ellis*, 3 *Caines*, 252.) If a guardian has power to submit a pending suit to arbitration, it is not easy to see why he has not the power himself to settle it. If he may submit a controversy to others to settle, it is clearly illogical to say that he has not the power to settle it himself. Can he impart to others powers which he himself does not possess ? The very object of an appointment of guardian is that he may bind the infant, who cannot bind himself. A guardian is unlike a receiver, who is the mere instrument of the court. The guardian when appointed asks no leave of the court to bring an action. Why should he ask such leave to discontinue it, when brought ? His own judgment in both cases is to be the criterion of his action. A settlement by a general guardian of an infant, with executors for the infant’s share of the testator’s estate, is binding upon the infant, so far as to throw the burden of proof upon the ward on coming of age, of error in the settlement. (*Dakin v. Demming*, 6 *Paige*, 95, 100.) In other words, the acts of a guardian are to be taken as legal and honest, and therefore binding, until impeached for error or bad faith. And it makes no difference that in the present case the guardian is a guardian *ad litem* and not a general guardian. His powers, so far as they extend, (limited to the bringing and con-

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ducting this action,) are just as ample within their limited scope, as those of a general guardian ; and he is to be guided by the same principles, "fidelity, ordinary diligence and prudence in the execution of his trust." (*White v. Parker*, 8 Barb. 48.) In the case at bar there is no pretense that the settlement was unfair or fraudulent ; but simply "that the guardian could not settle the suit without leave of the court." Besides, the guardian has a pecuniary interest in the matter ; his liability to his adversary for costs of the action. Is the court to determine how long and to what extent this liability is to continue ?

II. To the injury complained of by his negligence, the plaintiff himself contributed. The injury occurred in the highway ; an even, plain, open road of usual width, having several beaten tracks for teams—the river on one side of it and a fence on the other ; with a beaten foot-path next the fence, just outside of the track for teams ; the road being much traveled by the public, and teams passing to and from the Smithboro' depot on the Erie rail road. The plaintiff in his testimony gives this account of the occurrence : "I had been at school in Nichols ; I was returning from school at noon ; I was going along kicking the snow, with my head down. Edgar Morey and Sullivan Morey were with me ; I was on my way home, on a walk ; I was on right hand side of the road and within two feet of the fence ; road was of the ordinary width ; Edgar said to me, 'look out ;' I looked up and jumped one side ; my foot slipped and cutter thill struck me in the eye at the same time and knocked me down." He further says : "when I looked up, was the first I saw the cutter or men in it." "If I had been looking up I could have seen from the school house to above where I was hit ; I could see a good part of the road nearly up to the grist mill, which is above where I was hurt ; could have seen teams if they had been out in the road ; I did not see the horse and cutter at all until I was hit." All this shows conclusively that no injury would have occurred to plaintiff,

had it not been for his own folly in going into a much used public highway with his head down, and his attention engrossed by kicking snow, instead of looking out for his personal safety. Nor is there any conflict of evidence on this point. He says, "if he had been looking up he could have seen." But why was he not "looking up?" If he "had been looking up and had seen," as was his business to do, would he have been injured? Nobody could so pretend. Is it the business of a prudent person to go into the street blindfold, and amuse himself with kicking snow? It is not enough that the defendant drove his horse carelessly and negligently; but it must appear that the plaintiff himself is free from fault. If he has in any degree contributed to produce the injury complained of he cannot recover. On this point it is useless to cite cases, the principle being so familiar. The case of *Wilds v. Hudson River Rail Road Co.* (23 *Howard's Pr. Rep.* 492,) is a mere reiteration of the acknowledged doctrine on this subject, and is a sufficient guide in the present case.

Warner & Tracy, for the respondent. I. The offer of defendant to show the settlement was properly rejected. In his supplemental answer the defendant sets up that the *guardian ad litem* of plaintiff had for a valuable consideration settled the action, and "*relinquished all claim and cause of action against defendant*," and his offer was to show that the *cause* had been *settled* as alleged in the supplemental answer. The proof was therefore offered as a *bar* to the cause of action, and if it had been received, and a judgment rendered upon such an issue, the plaintiff could never afterwards have maintained an action against the defendant for the injury he had sustained. He did not therefore rely upon an agreement to *discontinue the action*, (and if he had his proper remedy would have been by motion to compel the entry of an order to that effect, and that the cause be stricken from the calendar rather than to give such

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agreement in evidence after a trial upon the merits;) but he took the broad ground that the "*cause had been settled.*" And the sole question presented is whether a settlement of *the cause of action* made by the next friend of an infant plaintiff, without order of court, will operate as a bar against the infant. The guardian ad litem of an infant plaintiff is appointed "as a person who may be responsible to the court for the propriety of the suit in its institution and progress." As an infant cannot employ an attorney, nor render himself liable for costs, this next friend, or guardian ad litem, is appointed to take his place and assume those liabilities in the *conduct* of the suit to which the rules of mutuality require both parties should be bound, but which the infant himself cannot incur. (2 *Barb. Ch. Pr.* 201.) Hence the law allows no infant to prosecute an action unless he appears by such guardian, and the guardian assumes the liability, in order that the infant may have the benefit of an action. The powers and duties of such a guardian would therefore seem to be confined entirely to the performance of such acts, and to the incurring of such responsibilities as the necessities which induced his appointment demand, and though the term *guardian* is used, it has never been supposed that there was any necessity for the next friend of an infant plaintiff to exercise the authority of a general guardian of the infant's property, or have any relation to his affairs, other than the conducting to a conclusion the particular action in which he is appointed. Thus before the code, the infant plaintiff appeared by *next friend*, who is defined to be, "He who without being appointed *guardian* sues in the name of the infant for the recovery of the rights of the latter." (*Bouvier's Law Dic. Prochien Amy.* 388.) So also he was first appointed by Statute Westm. 1, in case of necessity, when an infant was to sue his guardian. (*Jacob's Law Dic. under Prochien Amy.* 310.) And the rule which appoints him "admits him to *prosecute* for the infant a certain action," &c. (*Tillinghast's Forms*, 136.) The courts have also ex-

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exercised control over the next friend of infants, and directed their proceedings in such manner as would be most conducive to the infant's interests. Thus he will be removed, if he does not faithfully *prosecute* the action. (*Russell v. Sharp*, 1 *Jac. & Walk.* 482.) So if he take any proceeding which is incompatible with the prosecution of the suit, a reference will be ordered to see if he ought not to be removed. (*Ward v. Ward*, 3 *Mer.* 706.) So a next friend cannot withdraw himself without a reference to inquire if it is for the benefit of the infant. (*Melling v. Melling*, 4 *Madd. C. R.* 261. *Edw. on Parties*, 187, 188, 189. 2 *Barb. Ch. Pr.* 205.) Neither can a guardian ad litem admit or concede matters that he could if the cause were his own. (*Litchfield v. Burwell*, 5 *How.* 341.) Nor has he any power to submit a controversy without action. (9 *Abbott*, 34.) The very definition of his title; the reason of his appointment; the language of the rule which is his authority to act; and the control which the courts have ever exercised over him, as shown by the cases above cited; all show that the guardian ad litem of an infant plaintiff is confined in his duties to a faithful prosecution of the action, and has no power to release or settle away valuable rights of action belonging to the infant. The *right of action* is the infant's *property*. It existed before the suit was commenced, and is *property*, independent of any suit whatever, and the guardian has no more right to convey it away because there happens to be a suit connected with it, than he would have to convey away the infant's farm if it happened to be the subject of litigation. It does not follow that because the guardian is liable for costs, he has, or ought to have, the power to settle the suit. That argument would at most give him no more than the right to *discontinue*, but in fact it is no reason why he should do either. Having commenced the suit the guardian undertakes that it is for the infant's benefit, and he may not apply for a reference to determine the point. (*Jones v. Powell*, 2 *Meriv. C. R.* 141.) The court looks to the interests of the infant, not to those of the guardian, who

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having undertaken the trust, must discharge its duties until it is fully executed. Even the attorney or counsel of a plaintiff cannot *settle the suit* without special authority. (*Shaw v. Kidder*, 2 How. 244. 6 Cowen, 385.) The infant not being bound by a settlement of the cause of action had with the guardian, proof of such fact was immaterial and improper.

II. There was no error in the refusal to nonsuit. As regards the defendant's negligence, it was shown, that after having seen the boys six or seven rods ahead of his horse, he deliberately drove on a fast trot, out of the beaten track, over on to the foot path a few inches from the fence, and on to the plank laid down for foot passengers and where they were accustomed to walk. That he there ran against plaintiff with such force as to knock him "straight ahead of the horse off his feet," the thill of the cutter knocking out his eye. He does not pretend that he gave any notice to the plaintiff of his coming, but it appears that he used so little care to stop, or avoid the collision that the boy *behind* the plaintiff had to jump upon the fence to escape being run over also. Surely this accident was not unavoidable. Even if the defendant desired the benefit of the snow on the foot path, and had a right to be there, ordinary prudence required him to slacken his speed, and drive with a *view to the safety* of a crowd of children which he sees a few rods ahead of his horse, instead of the rapid and inattentive, if not reckless, manner in which he did. It can hardly be contended that a jury would not be warranted in predicating negligence upon such a proceeding as this, on the defendant's part, or that the court should decide, *as matter of law*, that the defendant was free from all negligence in causing the injury. But the defendant claims that the proof establishes, *as matter of law*, culpable negligence on the part of the plaintiff which contributed to the injury, and that therefore he should have been nonsuited, and he bases this claim upon the fact that the plaintiff "was going along, kicking the snow with his head down." The

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whole proof shows that the plaintiff was on the path appropriated to footmen, and on the plank walk laid down for their use; that it was not the custom to drive horses and sleighs on that path, but that there was a well defined track where they were in the habit of driving at a safe distance, 3 or 4 feet from the foot path. The plaintiff was lawfully in the path, which was the most appropriate and safe place on the road for him to be in. The wind blowing hard in his face caused him to walk with his head down: and it is such an act, done under such circumstances that this court is called upon to pronounce *culpable negligence, as matter of law*. The plaintiff was not bound to use *unusual* precaution and watchfulness, but only *ordinary care*, such as a prudent man would take under similar circumstances. (*McGrath v. The Hudson River R. R. Co.*, 32 Barb. 144. *Fero v. Buffalo & State Line R. R. Co.*, 22 N. Y. Rep. 215. *Johnson v. Hudson River R. R. Co.*, 20 N. Y. Rep. 65.) Judge Selden, in speaking of a plaintiff's negligence in a similar case, says: "If there are inferences to be drawn from the proof which are not *certain and incontrovertible*, they are for the jury. If it is necessary to determine, as in most cases it is, what a man of ordinary care and prudence would be likely to do under the circumstances proved, this involving, as it generally must, more or less conjecture, can only be settled by a jury." (*Bernhardt v. R. & S. R. R. Co.*, 23 How. Rep. 168.) We suppose no court would feel warranted in holding that the inferences drawn from the proof in this case, to establish the plaintiff's *culpable negligence*, are "*certain and incontrovertible*." The defendant had no peculiar and exclusive right to that path, and there was no reason for the plaintiff's apprehending any danger from teams being driven over him on the sidewalk. On the contrary the universal custom and habit was opposed to such an idea, and if the case admits of any question at all, it seems eminently proper that a jury should decide what a man of ordinary care and prudence would have done under these circumstances. (*See remarks*

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of Judge Johnson, 3 Kern. 533.) Besides, the evidence shows willfulness, or at least such gross negligence on the defendant's part, as to entitle the plaintiff to recover, though he were himself guilty of negligence. (19 Wend. 401. 21. id. 615, 619.) He attempted to run over the girls, and it may well be inferred that he was engaged in the same amusement when the plaintiff was struck. But a short distance intervened between the girls and boys, yet he scattered the boys as he did the girls, and never slackened his speed until the plaintiff had been "knocked clear off his feet." Such acts manifest a deliberate and willful intent on the defendant's part, and the plaintiff was entitled to have the case left to the jury upon that question.

By the Court, CAMPBELL, P. J. On the main question of fact, as to negligence, there is no ground for disturbing the verdict. The charge of the judge was not objected to, and there were no requests to charge. We must presume the judge laid down the law correctly. The motion for a nonsuit was properly denied. The evidence tended to show that the defendant was chargeable with gross if not with willful negligence. He drove his horse, on a trot, among a number of children just out of school, and with a wind beating in the children's faces. It was exceedingly doubtful, to say the least, whether there was negligence on the part of the plaintiff which in any degree contributed to his injury. Under what we know to be the ordinary, and which we are bound to presume was the actual charge of the judge, the jury must have found that the defendant's negligence was the sole cause; unless they may have found that the defendant was grossly and willfully negligent. In either view there was no error.

But the defendant alleged in his answer, and offered to prove, on the trial, that he had settled the action, with the guardian ad litem, and he claimed that by virtue of such settlement he was entitled to a discontinuance. It is unnecessary to consider whether a guardian ad litem might consent

to a discontinuance of the action, leaving the subject matter of the action still in existence and to be adjudicated in another action either instituted by himself, by another guardian, or by the infant on arriving at age. The question raised is, can he of his own mere motion make an absolute settlement of the whole matter in controversy? I am clearly of the opinion that he cannot. The only source of power, for the guardian ad litem, is the court. The appointment is made not by the infant but by the court, or a judge thereof. He is appointed to prosecute the action, and he may employ the ordinary and customary means to bring it if possible to a successful termination. The authority conferred upon him is to prosecute, not to settle; to obtain for the infant an adjudication as to his rights—not to barter away those rights in such manner as the guardian may choose. Certainly no such settlement could be binding on the infant, except made with the express sanction of the court.

If we were to consider the guardian in the light of an agent appointed to enforce a claim, or collect a debt, as such he is not, unless some special authority beyond the ordinary reach is given to him, clothed with authority to commute the debt for another thing, or to compound the debt, or to release it upon composition. (*Story on Agency*, § 99.) The employment of an attorney is "to prosecute or defend the suit in question," and he cannot, under his general authority, compromise his client's debt. He may discontinue an action, and he may enter into an agreement to discontinue, but he cannot, without special authority compromise the debt, or relinquish or settle the subject matter of the action. (8 *John*. 361; 10 *id.* 220, and other cases cited in *Graham's Practice*, under the head of "authority of an attorney.")

This action illustrates the necessity of confining the question within the strict limits of his authority. By the culpable negligence of the defendant, if not by his willful negligence, the plaintiff—a lad of about fifteen years of age—lost an eye. His guardian, appointed as his friend to prosecute the action,

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agreed to settle the matter for one dollar, and the plaintiffs' costs. The jury awarded to the plaintiff \$475. This I think was a small verdict. Such a settlement was a fraud, as against the infant, and should not be permitted to stand, even if the guardian had been clothed with authority to make it.

The order made at special term denying a new trial should be affirmed with costs, and there must be judgment on the verdict.

[BROOME GENERAL TERM, May 12, 1863. *Campbell, Parker and Mason*, Justices.]

 HYNDS vs. SHULTS and others, executors &c., and WARNER.

Where the owner of a mill-site has, by his dam, raised a certain head of water, and maintained such dam long enough to raise the presumption of a grant, he may repair his dam, for the purpose of making it tighter and more enduring, although the effect may be to keep the water more constantly at an upper level.

Making the structure more firm and tight, so as to enable the owner to enjoy the full benefit of his privilege, will not create a liability for damages, to the owners of adjacent land; so long as the height of the dam, as repaired, is not greater than it was before.

If the mill-owner does not, by his repairs, raise the water higher than it was before, so as to overflow lands not previously covered, no action will lie against him for damages.

MOTION for a new trial on exceptions, ordered to be heard in the first instance at the general term. Two actions were commenced, to recover damages of the defendant, Tobias Warner, and Jedediah Miller, since deceased. The first was tried before a referee, who reported in favor of the plaintiff. The judgment entered on this report was reversed on appeal. The actions were afterwards consolidated, by stipulation, and tried before Justice WRIGHT and a jury, at the Schoharie circuit, when a verdict was rendered in favor of the defend-

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ants. The defendant Miller died after the first trial, and the action was continued against his executors.

The complaint alleged that the defendants owned a grist mill on West creek, below the plaintiff's land, and had "the right to obstruct the water flowing in said stream," but no right to increase the height of their dam; and that in April, 1850, they raised the dam "two feet higher than they had any right to keep and maintain it," to the plaintiff's damages, \$2000.

The answer puts in issue the material allegations of the complaint; alleges the defendants' right by grant as well as by prescription, to obstruct the water to the extent of the actual obstruction; and avers that the change made in the dam did not increase its height, and that it was made in 1853, with the knowledge and consent of the plaintiff.

The mill dam in question was on West creek in Schoharie county. The plaintiff owned the land on the west side of the stream, and the defendants on the opposite side where the dam was maintained. Further up the stream the plaintiff owned the land on both sides. The defendants held under a title derived in 1840, through the plaintiff and others, and the grants embraced "all the mill dam, land covered with water, water privileges," &c.; with the right "to draw timber, stone and gravel to make, mend and secure said dam as may be necessary."

The mill dam was over fifty years old. Like most of the dams of that day, it was constructed with a frame of wood, filled with stone, and over this the usual timber plate and plank, with flush boards for the purpose of raising the water to the proper level; these being substituted in the upper portion of the dam for more expensive and more durable materials to retain the water in a low time, and to protect against ice and drifting timber. The old mill having been burnt, the defendants soon after their purchase erected a new and expensive grist mill. On the 22d of October, 1853, they proceeded to mend and secure the dam, which for forty-four

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years immediately preceding had been continued in use without any material repairs. The defendants claimed that the timber plate had settled below its original level. The planking had worn away, and had been replaced from time to time. The defendants placed on the timber plate a piece of timber five inches thick, and over this two thicknesses of three-inch hemlock plank; thus *raising* the permanent structure, or as was claimed the lower portion of the dam, higher than the corresponding portion of the dam as repaired in 1809, and as was claimed *reducing* the upper portion of the dam, formed by such boards. The defendants claimed that the plaintiff assented to these alterations. There was a conflict of evidence upon most of the material facts in the case, and especially as to the height at which the permanent structure was raised; and also as to whether the structure and improvements increased the height so as to injure the plaintiff.

The court charged substantially: 1st. That the action was brought to recover damages for alleged injuries resulting from the overflowing of the plaintiff's land by the defendants' raising the mill dam. 2d. That the defendants were entitled to maintain the dam in question at the same height it had been for twenty years and upwards preceding the time of the alleged injuries. 3d. That if the jury believed that the defendants, at the time of repairing had increased the height of the dam so as to raise the water and flow it back upon the land of the plaintiff to a greater height than it had been for twenty years preceding that time, then they were liable for damages sustained in consequence of it; if it had not been raised, they were not liable. 4th. That the defendants were not confined to any specified material, or to any particular mode of construction, in keeping the dam in repair; and whether the water was detained by a structure more or less permanent, or by flush boards, it would make no difference so long as the water was not raised higher than it had been.

No exception was taken to any portion of this charge. The plaintiff's counsel, however, requested the court to charge

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that the defendants had no right to use flush boards in any other or different manner from what they had been used for twenty years prior to the commencement of the suit. That if flush boards were used before to retain the water, at seasons of low water, and not at other seasons, the defendants had no right to increase the height of the permanent structure, and substitute that portion for a portion of the width of the flush boards, and the defendants were liable for the injury the plaintiff had sustained, by means of such increase of the height of the permanent structure.

The judge declined so to charge, but he charged substantially, that so far as the plaintiff's right to maintain the action was concerned, it depended upon the facts whether his land and premises had been overflowed at any season of the year, by the defendants' increasing the height of the water, in constructing or repairing their mill dam, beyond the usual and ordinary height of the water for twenty years previously to such construction or repairing; and that the plaintiff could not complain of the mode of repairing the dam, provided the effect had not been to increase the height of the water, and thereby overflow some parts of the plaintiff's land or premises not before overflowed. To this refusal to charge, and to the portion of the charge last made, the plaintiff duly excepted. The plaintiff's counsel also requested the court to charge that the owners of the dam acquired no right by the use of temporary flush boards to retain the water during the period of the year when the water was low, and to substitute for any portion of such flush boards a permanent structure. The court declined to charge other and differently than already charged, to which the plaintiff's counsel excepted. The other exceptions taken on the trial appear in the opinion.

H. Smith, for the plaintiff.

L. Tremain, for the defendants.

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By the Court, MILLER, J. This case arises upon exceptions ordered to be heard in the first instance at the general term, and no question therefore as to the weight of the evidence can be made or considered. I think the justice properly excluded the question put to the witness Hynds requesting him to look at a copy of the memorandum he had made, and state the width of the flush boards. The witness had already testified to the width of the flush boards, from the copy memorandum, and even if the question had been originally proper, I see no necessity for its repetition.

I am inclined to think that the decisions of the justice on the trial, as to the mode of proving the damages sustained by the plaintiff by reason of the injury complained of, were correct, but as the jury found a verdict in favor of the defendants, without considering the question of damages, this point is of no consequence.

The charge of the court as originally made, mainly covered the case presented by the evidence. The first request to charge embraced propositions not entirely applicable, which might perhaps have a tendency to mislead the jury from the real and only question involved, viz: the effect of the new dam in raising the height of the water, and thus causing an injury to the plaintiff. When the request was made the judge had already charged that if the defendant had increased the height of the water he was liable for any damages which accrued; and the material or structure used made no difference, so long as the water was not raised. I think the charge covered the whole ground, and hence it was proper to refuse to charge as requested. But if it did not, the subsequent charge did so. The effect and substance of it was to present to the jury the question whether the land and premises had been overflowed at any time, and injuries had been done to the plaintiff by the defendants increasing the height of the dam in making repairs. Unless some damage had been done, the defendants were not liable; and a mere change from a temporary to a permanent structure could make no

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difference. I cannot well conceive how the defendants could by any possibility be made liable when there was no change in the height of the water, and no injury committed.

The defendants could not be made liable for the reason that the plaintiff owned the land on one side of the stream where the dam was erected, unless some injury had been done or some trespass committed by them. No such proposition was presented, nor was the judge asked to charge in reference to it. Under no circumstances could the defendants be responsible for making the permanent structure on the dam, unless by means of it the plaintiff was damaged.

I do not think the next exception was well taken, and the judge was right in refusing to charge that the owners of the dam acquired no right by the use of temporary flush boards to retain the water during periods of the year when there was low water, and to substitute for any portion of such flush boards a permanent superstructure. So long as the height of the dam was not raised by the permanent structure, and was no greater than it was before; so long as the improvements made by the defendants inflicted no injury upon the plaintiff; I think they were lawful and proper. Making the structure more firm and the dam tighter, so as to enjoy the full benefit of the privilege at the height it originally was, can furnish no cause of complaint, or create a liability. This principle was settled in *Cowell v. Thayer* (5 Metcalf, 253, 259,) which is decisive of this case. It is held in that case that where a man has by his dam raised a certain head of water, and maintained such dam long enough to raise the presumption of a grant, he may repair his dam, to make it tighter, although the effect may be to keep the water more constantly at an upper level.

Where a prescriptive right has been acquired to a constant mill privilege, by keeping up and using a dam for more than twenty years, Shaw, C. J. says, in the case cited, "If he repairs the dam without so changing it as to raise the water higher than the old dam when *tight and in repair*

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would raise it, or uses it in a different mode, and thereby keeps up the water *more constantly* than before, it is not a new use of the stream, for which an adjacent owner can claim damages, *but a use conformably to his prescriptive right.*"

The principle here enunciated was sustained by the general term on the appeal from the decision of the referee. (*See opinion.*)

In view of the whole case, I am of the opinion that there was no error committed on the trial. A new trial must therefore be denied, with costs.

[ALBANY GENERAL TERM, May 5, 1862. *Hogeboom, Peckham and Miller, Justices.*]

CHAMPLIN and GRANT, administrators &c. *vs.* JOHNSON and others.

After the debt secured by a chattel mortgage has become due, and a forfeiture has occurred by reason of non-payment, the title of the mortgagee is absolute, and the mortgagor has no interest in the mortgaged property which is liable to be sold on execution against him.

And this notwithstanding the property has been suffered to remain in the possession of the mortgagor, after forfeiture.

APPEAL from a judgment of the county court of Sullivan county. On the 19th of November, 1860, Lucas Clark was indebted to Robert Y. Grant in the sum of one hundred dollars, and being at that time in the occupation and possession of a farm of land and certain personal property, he executed and delivered to the said Grant a chattel mortgage covering two heifers. By the terms of this mortgage the said sum was to be paid in six months thereafter, with interest, and Clark was to remain in possession of the property until default in payment; and in case of default the mortgagee had the right to take the property upon the premises of the mortgagor, or wherever the same should be

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found, and to sell the same, and out of the proceeds to satisfy his demand and expenses of seizure and sale, and was to return the surplus to the mortgagor. The mortgage was duly filed in the proper clerk's office. The property was never in the possession of the mortgagee, but remained in Clark's possession until October, 1861, at which time the defendant Johnson, having a valid judgment against Clark, caused the same to be seized and sold by the defendant Prince, a constable, by virtue of an execution. The property was purchased by the defendant Dennis Johnson, and was in the possession of the defendant John Johnson at the time of the commencement of this action.

This action was brought by the mortgagee in his lifetime, before a justice of the peace, to recover damages for the alleged wrongful taking of the property. Upon the trial it was proved that on the day of sale, by writing and otherwise, the plaintiff notified the defendants that he owned the cattle. After the plaintiff rested, the defendants moved for a nonsuit on the grounds, 1. That the plaintiff never had actual possession of the property. 2. That the defendants had a right to take the property, and that the plaintiff had not made any demand of the defendants for the property or its value. A judgment was rendered in favor of the plaintiff for \$24 damages, the value of the property taken. The defendants appealed to the county court, which reversed the judgment of the justice, and the plaintiffs appealed from the county court to the supreme court.

A. J. Bush, for the plaintiff and appellant.

T. F. Bush for the defendants and respondent.

By the Court, MILLER, J. The amount secured by the chattel mortgage had been due for some time, and the property remained in the possession of the mortgagor when levied on and sold. The principal question presented is, whether

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under such circumstances the mortgagor had such an interest in the property covered by the mortgage as was liable to be seized by virtue of an execution against him.

I. Until a chattel mortgage becomes absolute by the non-performance of the condition of the mortgage, the mortgagor has such an interest in the chattels mortgaged as is liable to levy and sale on execution, and the purchaser at the sale on execution takes the property subject to the mortgage, and acquires with it a right to redeem it by payment of the amount due on the mortgage. (*Bank of Lansingburg v. Crary*, 1 Barb. Sup. C. Rep. 542. *Saul v. Kruger*, 9 How. Pr. 572.)

In *Hull v. Carnley*, (1 Kern. 501,) which is a leading case, Denio, J. in stating the principle to be applied to such cases, says, "I consider it well settled that chattels which have been mortgaged may, notwithstanding, be seized upon execution against the mortgagor, where he is in possession, and at the time of the seizure was entitled to the possession *for a definite period, against the mortgagee.*" The same doctrine was recognized in *Hull v. Carnley, executrix*, (17 N. Y. 202,) and *Goulet v. Asseler*, (22 id. 225.)

I do not understand, however, that the principle laid down in the authority cited applies to cases where the mortgage debt *has become due* and the mortgagor has no right to the possession of the property. A chattel mortgage transfers to the mortgagee the whole thing mortgaged, subject to be defeated by the performance of the condition. (*Butler v. Miller*, 1 Comst. 496.) Upon a failure of the mortgagor to perform the condition of the mortgage the mortgagee acquires an absolute title to the chattel. (*Brown v. Bement*, 8 John. 96. *Otis v. Wood*, 3 Wend. 498. *Langdon v. Buel*, 9 Wend. 80. *Patchin v. Pierce*, 12 id. 61. *Dane v. Mallory*, 16 Barb. 46. *Stewart v. Slater*, 6 Duer, 99.) In the case of *Stewart v. Slater*, last cited, it was held that after the mortgage becomes due, although the mortgagor remains in possession, he has no interest which can be levied upon and sold

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by virtue of an execution. The same doctrine is laid down in *Howland v. Willett*, (3 *Sandf.* 609. See also *Mattison v. Baucus*, 1 *Comst.* 295.)

The mortgagee having an absolute title to the property covered by the mortgage, and a right to remove it, I think there was not such a possession or interest in the mortgagor as was liable to be sold under an execution against him. Nor does the fact that the plaintiff suffered the property to remain undisturbed in the possession of the mortgagor alter the principle involved. The title to the property having become absolute, it belonged to the plaintiff. The taking was wrongful, and the plaintiff had a right of action without even a demand. (See *authorities above cited*, also 1 *Comst.* 590 ; 8 *Pick.* 333 ; 3 *Sand.* 607.)

II. The fact that the mortgagee, on the day of sale, advised the defendants of his claim does not help the defendants' case. He informed them that the property belonged to him. This was full notice of his rights, sufficient to put the defendants upon their guard ; and even conceding that the doctrine of estoppel applies, I do not see how they are injured, when the plaintiff claims, now, no more than he did on the day of sale.

III. It was not necessary to reduce the property to an actual possession in order that the plaintiff might maintain this action. It is sufficient that he had *a right to the possession* of the property. His title had become perfect by the failure of the mortgagor to pay the demand secured by the mortgage, and none of the authorities cited hold that in such a case an action will not lie for taking the property.

In *Manning v. Monaghan*, (23 *N. Y. Rep.* 545,) where the action was brought by the mortgagee for taking the property before the mortgage debt had become due, Comstock, Ch. J. says, "These forms of action depend on *possession or the right of possession* at the time of the alleged trespass." The plaintiff certainly had "the right of possession" to the property in question ; that right had been dis-

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turbed and the property taken by the defendants, and they were clearly liable to respond for the damages sustained.

IV. It is only in cases where the mortgage debt is not due and the mortgagor is in the possession of, and at the same time entitled to the possession by the terms of the mortgage; that a special action for injuries to the reversionary interest can be maintained. (*Gaulet v. Asseler*, 22 N. Y. Rep. 225. *Manning v. Monaghan*, 23 id. 539. *Hull v. Carnley*, 1 Kern. 501.) The reason of this rule is very apparent. The mortgage not being due, the mortgagee by its express condition has no right to the possession of the property. Hence no action lies.

The taking of the property was illegal and wrongful. The plaintiff was not bound to retake it or even make an effort to regain possession of it, and neither upon principle nor authority can this be regarded as a case to which the principle of *damnum absque injuria* applies.

I am of the opinion that the judgment of the county court was erroneous, and should be reversed with costs, and the judgment of the justice affirmed.

Judgment accordingly.

[ALBANY GENERAL TERM, September 1, 1862. *Hogeboom, Peckham and Miller*, Justices.]

DORLON, adm'x, &c. vs. CHRISTIE.

D. being the holder of a promissory note for \$600, made by S. and indorsed by C., which was overdue, and had been protested for non-payment, and C. duly charged as indorser; H. as agent of S. brought to D. from S. an accepted draft for \$500, on a third party, which had some forty days to run before maturity; also a new note of S., not yet due, for \$165.50, being the balance remaining due on the old note, after deducting the amount of the draft. H. indorsed over the draft and the new note to D., who received the same, agreeing that he would not receive them in payment upon the original note, but would hold them until the maturity of the new note and

610
3 446
4 544
6 197
41 197
7a 604
8a 100
54a 467
70a 551

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draft, and then enforce the old note if they were not paid. *Held* that there was a valid and binding agreement to extend the time of payment of the original note; and, that such extension of the time discharged the indorser. *Held*, also, that whatever might have been the intention of the parties as to taking the new note and draft as collateral, yet if the time of payment was actually extended until the maturity of the new note, then the indorser was discharged.

APPEAL from a judgment entered at a special term on a decision of the court, upon a trial at the circuit without a jury. The case was tried at the Rensselaer county circuit before justice PECKHAM. The action was on a note dated Troy, January 7, 1855, executed by one L. R. Sargent, and payable to the order of Robert Christie, jun. the defendant; by him indorsed to Mrs. G. V. Huddleston, by her to E. Dorlon, and by him to the plaintiff, administratrix of Robert Dorlon, deceased, by which Sargent, three months after date, promised to pay six hundred dollars, with interest, at the Farmers' Bank of Troy. While in the hands of Dorlon, and overdue, (it having been duly protested and sufficient notice given to charge the defendant Christie,) one W. D. Huddleston, *without authority from Dorlon, but at Sargent's request*, brought Dorlon from Sargent a draft on a third party, which had some forty days to run to mature, for \$500, accepted by the drawee, and which was received and credited by Dorlon as a payment on the note, and also a new note of Sargent not indorsed, otherwise than by Huddleston, acting as Sargent's agent, for \$165.50, being the amount due on the note in suit, dated May 19, 1856, payable in thirty days, which Huddleston offered Dorlon in settlement of the note in suit. The draft and note were then indorsed over to Dorlon. This was nothing more than the note of Sargent, payable to his own order, and indorsed by him, and the court found the fact to be that such note was not indorsed. When Huddleston offered the \$500 draft, and note of Sargent in settlement of the note in suit, Dorlon *took the draft and note, telling Huddleston at the time that he would not receive them in payment upon the old note, indorsed by the*

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defendant, but would hold them until maturity of the new note and draft, and enforce the old note if the new note and draft were not paid. Dorlon did not at the time know that the defendant was an accommodation indorser. The new note and draft were sent by Sargent through Huddleston to Dorlon *to take up the old note.*

The court held that this transaction extended to the maker the time of payment of the original note, and the indorser was, thereby, discharged. To which decision the plaintiff excepted. Judgment being rendered for the defendant, on this decision, the plaintiff appealed to the general term.

George Van Santvoord, for the appellant and plaintiff.

R. Christie, Jr. for the respondent and defendant.

By the Court, MILLER, J. When the draft and note were delivered to Dorlon on settlement of the note in suit, it was agreed that he would not receive them in payment of the old note, indorsed by the defendant, but that he would take them and hold them until the maturity of the draft and note, and would then enforce the old note if they were not paid. Upon the foregoing facts two questions arise.

First. Were the note and draft received in payment of the old note, or merely as collateral to it?

Second. Was the time of payment extended upon the old note by a valid and binding agreement entered into for a good consideration, and which could be enforced?

I. Whatever may be the legal effect of the agreement with Dorlon, I think the evidence clearly establishes that he did not intend to receive the new note and the draft in payment of the old note, but merely as collateral security to it. He expressly refused to receive them in payment, and stipulated to hold them until maturity, and if they were not then paid to enforce the note in suit. Taking new security from the

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principal does not discharge the surety, unless time is given. Nor will he be discharged if the contract reserves all the rights of the creditor against the surety; for in that case the surety may pay immediately and forthwith proceed against the principal. (*Wagman v. Hoag*, 14 Barb. 232, and authorities there cited. *Gahn v. Niemcewicz*, 11 Wend. 312.)

In *Taylor v. Allen*, (36 Barb. 294,) it was held that the receipt of a new bill or note having time to run, from the party primarily liable, did not operate to discharge the indorser on a bill or note overdue, unless there was an agreement express or implied that the new bill or note should be in payment of the former, or extending the time of payment in favor of some party who was liable thereon prior to such indorser. If the new note or draft is taken as collateral to the old note, the right to an immediate action is not suspended, and the indorser or surety is not discharged. (See also *Myers v. Welles*, 5 Hill, 463; *Fellows v. Prentiss*, 3 Denio, 512; *Hart v. Hudson*, 6 Duer, 294; *Huffman v. Hulbert*, 13 Wendell, 375; *Bailey and Remsen v. Baldwin*, 7 id. 289.)

Dorlon doubtless intended not to surrender his claim upon the defendant as indorser of the old note, and he had a perfect right to do what he did, under the authorities cited; provided he did not extend the time of payment, and thus affect the rights of indorsers.

II. The question whether the time of payment was extended upon the old note by a binding and valid agreement for a good consideration, is one of more difficulty. And whatever may have been the intention of the parties as to taking the new draft and note as collateral, yet if the time of payment was actually extended until the new note became due, then the indorser was discharged. (See cases above cited; also, *Miller v. McCan*, 7 Paige, 451; *Putnam v. Lewis*, 8 John. 389.) Mere indulgence by a creditor without a valid and express agreement to extend the time of payment of a bill or note, will not exonerate the surety or indorser.

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(*Reynolds v. Ward*, 5 *Wend.* 501. *Bank of Utica v. Ives*, 17 *id.* 501. *Draper v. Romeyn*, 18 *Barb.* 166.) The surety is discharged, however, in all cases where without his assent the time of payment by an agreement binding on the creditor was extended to the debtor. (*Hart v. Hudson*, 6 *Duer*, 294, and authorities there cited.)

The taking of a new note or bill from the debtor, payable at a future day, suspends until then the creditor's right of action for the original debt, and operates in all cases as an extension of credit, by which not merely an ordinary surety but an indorser not assenting to the transaction is discharged. (*Id.* See also *Elwood v. Deifendorf*, 5 *Barb.* 398 ; *Hubbell v. Carpenter*, *Id.* 520.)

The consideration of the agreement to extend the time, if any such was made, was a draft for five hundred dollars duly accepted, and which was afterward paid at maturity, and a note for the balance. Dorlon received the benefit of the security, and Sargent actually paid the amount of the draft. Sargent was liable on the note for the balance. I think there was a consideration of benefit on the one side and harm on the other, and sufficient to sustain the agreement. (See 11 *Wend.* 318 ; 3 *Denio*, 512 ; 5 *Hill*, 463 ; 6 *Duer*, 294.)

The consideration being sufficient it remains to be considered whether the agreement was of such a character as to extend the time of payment. If Dorlon was not prevented from prosecuting the old note, and the defendant prevented from compelling him to prosecute, then the time of the payment of the note was extended. (11 *Wend.* 312. 5 *Barb.* 20. 14 *id.* 239.) Even if there was sufficient evidence upon the question of fact to submit the case, then this court cannot interfere. The defense in a suit upon the old note prior to the time when the draft and new note became due, would be that the time of payment was extended. The proof would show an agreement not to receive the draft and new note in payment, but to take and hold them until maturity, and enforce the old note, if the draft and new note were

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not then paid. The agreement not to enforce the old note was virtually an extension of the time of payment until the period referred to. It was saying, "I will take the new securities; hold them, and wait upon the drawer until they become due, and if not then paid, I will prosecute the old note." The absence of a stipulation providing that the arrangement should not prejudice the holder's claim against the drawer and indorser, nor prevent a suit if ordered by the indorser, is a very strong circumstance to show that Dorlon meant to waive his right in this respect, if it is not conclusive. It must be regarded somewhat as determining the character and import of the agreement, as omissions are often controlling in construing contracts. Perhaps it is not very important in this case, as there was an agreement to delay; an express provision to enforce the old note at the expiration of the time when the draft and new note became due. I think this was an extension of the time, and is conclusive. It certainly presents some evidence upon that subject, and the justice who tried the cause having arrived at the conclusion that Dorlon extended the time of payment, his decision should not be set aside.

I am therefore of the opinion that a new trial should be denied, and the judgment affirmed.

[ALBANY GENERAL TERM, December 1, 1862. *Hogeboom, Peckham and Müller*, Justices.]

LESTER vs. PAINE.

A check was drawn by W. payable to the order of the plaintiff, and indorsed by the defendant. It was negotiated to the plaintiff, by W., in payment for property sold. The plaintiff afterwards indorsed the check, and passed it, and the same being protested, for non-payment, he retired it, at maturity. The defendant did not indorse the check to give the maker credit with the plaintiff, and did not intend or agree to become liable to the plaintiff upon the check, or otherwise than as second indorser. *Held* that the plaintiff could not maintain an action against the defendant, upon the check.

Under such circumstances, the legal intendment is that the indorser only intended to become liable as a second indorser, and *subsequent* to the payee. And that he indorsed the paper with the understanding that the payee was to be the *first indorsee*.

Aside from the paper itself, there must be extrinsic evidence that the indorsement was given with the intent of the indorser to give the maker credit with the payee, so that the payee would have a right to indorse his name, without recourse.

Knowledge by the indorser that his indorsement is to be used by the maker of the check to obtain credit with the payee is not to be inferred from the fact that the indorser signed before the payee.

APPEAL from a judgment entered upon the decision of the court, on the trial, at the circuit. The action was brought by the plaintiff as payee and holder of a check drawn by George W. Wilson on the Troy City Bank, for \$274.08, payable on the 19th day of June, 1859, and indorsed by the defendant. The check was payable to the order of the plaintiff. It was negotiated to the plaintiff by Wilson, in payment for property sold, being at the time indorsed by the defendant. The plaintiff afterwards indorsed, in blank, and passed the check, and it being protested, he retired it at maturity.

The complaint averred an agreement, by which the defendant was to become liable on the check to the plaintiff, to whose order it was payable. The answer averred that the defendant neither intended to nor did become liable to the plaintiff, through his indorsement. It appeared upon the trial, that the defendant did not indorse to give the maker of the check credit with the plaintiff, and did not intend or

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agree, to become in any manner liable thereon, to the plaintiff. Wilson, the maker, was a co-defendant, and failed to answer the complaint. The cause has been twice tried. The plaintiff succeeded on the first trial. On appeal, the judgment in his favor was reversed, and a new trial ordered. The cause was tried the second time before Justice BARNARD at the Rensselaer circuit, without a jury. The plaintiff was sworn on his own behalf, on the trial, and testified that he received the check from the defendant Wilson in payment for cattle sold by him to Wilson at the time he received it. That when he received it the defendant's name was indorsed on it. That the cattle so sold formed the consideration of the check; that he had not seen Paine in relation to the check prior to its delivery to him, and did not know of any agreement on the part of Paine to sign as security for Wilson. That after he received it he got it discounted at the Market Bank of Troy and then indorsed it. The check was duly protested, and paid by the plaintiff. There was no other evidence given.

The justice found, among other things, that the defendant Paine did not indorse the check to give the maker thereof credit with the plaintiff, and did not intend or agree to become in any manner liable to the plaintiff upon said check, or otherwise liable upon the same than as second indorser thereof; and as a conclusion of law, that the defendant E. Warren Paine is not liable to the plaintiff upon the said check, and that the plaintiff ought not to recover any sum against him thereon; and directed judgment to be entered in favor of the defendant against the plaintiff, with costs against the defendant George W. Wilson, he not having answered the complaint.

Judgment was accordingly entered in favor of Paine against the plaintiff, for \$230.49, costs, and the plaintiff appealed to the general term.

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G. Stow, for the plaintiff and appellant.

W. A. Beach, for the defendant and respondent.

By the Court, MILLER, J. The justice before whom this cause was tried has found that the defendant Paine did not indorse the check to give the maker thereof credit with the plaintiff, and did not intend or agree to become in any manner liable to the plaintiff upon the check, or otherwise than as second indorser thereof. I do not discover that his finding is not warranted by the evidence in the case. The testimony is entirely barren of any thing to show a knowledge by the defendant Paine of the facts in reference to the purpose for which the check was given. This is the great difficulty in upholding the plaintiff's case; and it can only be done upon the theory that the check, being payable to the plaintiff, must be presumed to have been made for the plaintiff's benefit, with the knowledge of the defendant. I do not think that any such hypothesis is sustainable. The earlier decisions of the higher courts in this state hold an entirely different doctrine. The case of *Herrick v. Carman*, (10 *John*. 224; 12 *id.* 159,) which was similar to the case at bar, the note being payable to the order of the payee, who was the assignee of the plaintiff, was decided upon the ground that it did not appear that the defendant had sufficient knowledge of the consideration to make him liable otherwise than as second indorser. Mr. Justice Spencer expresses the opinion that if the plaintiff had supplied this proof the action might have been sustained. (12 *John*. 160, 161.) In *Nelson v. Dubois*, 13 *John*. 175,) the opinion of the court in *Herrick v. Carman* was adopted and applied. In *Campbell v. Butler*, (14 *John*. 349,) where the note was payable to the order of the plaintiff and it appeared that it was made to give the maker credit, with the knowledge of the indorser, it was decided that the rule laid down in *Herrick v. Carman* and *Nelson v. Dubois* applied.

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In *Truman v. Wheeler*, 17 John. 318,) where the note was payable to the plaintiff or order, and it did not appear that the defendant knew for what purpose the note was designed, or that there was any communication between him and the holder of the note, it was decided that the defendant was only liable as second indorser. I do not understand that this doctrine has been disturbed by any of the later cases. (*See Hall v. Newcomb*, 3 Hill, 233; 7 *id.* 416; *Waterbury v. Sinclair*, 16 How. Pr. 340; *opinion of Emott, J.* 341.)

The last reported case where the question has arisen is *Moore v. Cross*, (19 N. Y. Rep. 227.) It should be noticed that the marginal note of that case is rather broad, and not sustained fully by the opinion. The action was brought to recover the amount of a promissory note made by one McGervy, payable to the order of the plaintiff, and indorsed by the defendant. The facts are similar to those in the case at bar, with the exception that it appeared that the defendant indorsed the note for the purpose of paying for coal sold and delivered by the plaintiff to the maker on the credit of the indorsement, and that the note was delivered thus indorsed, for the coal sold and delivered, *with the privity of the defendant*. The case sustains the doctrine enunciated in the earlier decisions, and Johnson, J. indorses the principle established in *Herrick v. Carman* and *Gilman v. Wheeler*, and says: "In neither of them was it made to appear that the second indorser put his name on the paper to give the maker credit with the payee." It appeared distinctly in this case that the indorser was privy to the contract, and that his name was put upon the paper for the purpose of giving the maker credit with the payee.

When the case now considered was presented to the court, on a previous occasion, it was held by Mr. Justice Peckham in his opinion, that it was not enough that Lester and Wilson agreed that Wilson should procure Paine as surety, but knowledge should be brought home to Paine, whether he indorsed before or after Lester.

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It is quite obvious from the cases cited, that knowledge cannot be inferred from the fact that the indorser signed before the payee. Under such circumstances the legal intentment is that the indorser only intended to become liable as a second indorser and *subsequent* to the payee; and that he indorsed the paper with the understanding that the *payee* was to be the *first indorser*. Aside from the paper itself there must be extrinsic evidence that the indorsement was given with the intent of the indorser to give the maker of the note credit with the payee, so that the payee would have a right to indorse his name without recourse. There was no such evidence on the trial, and I am of the opinion that the decision of the justice was correct, and the judgment entered thereon should be affirmed.

[ALBANY GENERAL TERM, December 1, 1862. *Hogeboom, Peckham and Miller, Justices.*]

CALKINS vs. FALK.

What is an insufficient memorandum in writing of a contract for the sale of goods for the price of fifty dollars or more, within the statute of frauds.

The law sometimes supplies by its implications, the want of express agreements between parties, but never overcomes by implications the express provisions of parties. If they are illegal, the law avoids them.

So if the meaning of the instrument is uncertain, the intention may be ascertained by extrinsic testimony; but it must be a meaning which may be distinctly derived from a fair and rational interpretation of the words actually used. If it be incompatible with such interpretation, the instrument will be void for uncertainty and incurable inaccuracy.

APPEAL from judgment entered in a decision made at the circuit. The action was brought to recover damages for the breach of an alleged executory agreement to sell to the plaintiff's assignor, James E. Sutphen, a quantity of hops, and was tried at the Schoharie circuit in November 1861, without a jury. The defendant, by his answer, denied the

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making of the agreement, and also set up as a defense, that the contract if made, was void by the statute of frauds. The evidence of the contract consisted in certain written instruments. The writing signed by the defendant was in the words following, viz :

"Seward, Aug. 31st, 1860.

I have this day sold my entire crop of hops of this year's growth, of about four acres hops, to be well picked and cured and baled. Delivery to be at Palatine Bridge, upon about ten days' notice. Said hops to be a good merchantable hop, for which I agree to pay to said Abram Falk the sum of 18 cents per pound, on delivery. Said delivery to be on or before the first day of November next. **ABRAM FALK."**

The plaintiff also produced a writing signed by his assignor in the following words, viz :

"Seward, Aug. 31st, 1860.

I have this day sold my entire crop of hops of this year's growth, of about four acres hops, to be well picked and cured and baled. Delivery to be at Palatine Bridge, upon about ten days' notice. Said hops to be a good, merchantable hop, for which I agree to pay to said Abram Falleck the sum of 18 cents per pound, on delivery ; delivery on or before the first day of Nov. next. **JAMES E. SUTPHEN."**

The plaintiff was sworn on his own behalf and testified to the death of Sutphen his assignor ; proved the assignment ; that the contract had been presented to the defendant and notice given of the assignment, and then that he was notified to deliver the hops on the first of November as the contract provided, and he said he would if one Borst had nothing to do with it. It was also proved that hops were not delivered, but were sold by the plaintiff to other parties, and what the difference was between the price named and the market price where they were to be delivered. A nonsuit was moved for on the grounds that the evidence failed to establish a cause of action ; that the contract was void by the statute of

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frauds; and also that it was void for want of mutuality. The nonsuit was refused, and the counsel for the defendant excepted to the refusal to grant the motion. The justice rendered a judgment in favor of the plaintiff for \$809.64 damages, from which judgment the defendant appealed.

L. Tremain, for the appellant and defendant.

D. C. Bates, for the respondent and plaintiff.

By the Court, MILLER, J. It is claimed by the defendant's counsel that the contract introduced in evidence was void by the statute of frauds. That statute provides that every contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more shall be void unless a memorandum of such contract be made in writing and be subscribed by the parties to be charged thereby. (2 R. S. 135, § 3.) The signing of the memorandum by the vendor is a sufficient compliance with the statute. (*Worrall v. Munn*, 1 Seld. 229. *Russell v. Nicoll*, 3 Wend. 112. *Davis v. Shields*, 26 id. 341.) The terms of the contract and the names of the contracting parties, however, must appear in the instrument. (*Clason v. Bailey*, 14 John. 486, 487. *Champion v. Plumer*, 4 Bos. & Pull. 253.) The memorandum must state the contract with reasonable certainty, so that it be understood without recourse to parol. (*Bailey v. Ogden*, 3 John. 417. 3 Atk. 503. 1 Vesey, Jun. 303.) With these general principles established, the inquiry arises whether a legal and valid contract was made out, on the trial, by the plaintiff.

1. I think the memorandum signed by the defendant was entirely defective, and insufficient for any such purpose. It did not contain the name of the person to whom it is claimed the hops were sold. It contained only a promise by the vendor to pay himself for the hops. The instrument was doubtful and uncertain in its phraseology, being an agreement

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of a vendor for the sale of property to himself and to pay himself for the property thus sold, on delivery.

2. If both instruments are construed together as several written instruments executed at the same time, between the same parties, relating to the same subject matter and forming parts of a single contract, the difficulty is by no means obviated. In that case, there is in addition to the agreement of the defendant, an instrument signed by the plaintiff's assignor in very nearly the same language as the one executed by the defendant, to the effect that Sutphen had sold his hops and agreed to pay one Abram Falleck, (not the defendant nor any person previously named in either of the writings) for them on delivery. There was no statement that the hops had been purchased by any one, or any thing to show a contract for the hops between two parties. When read together as a single contract they establish that each of the parties had sold his hops; that one of them, the defendant Falk, was to pay himself, for them, on delivery; and the other one, Sutphen, the alleged purchaser, was to pay one Falleck for hops he Sutphen had sold. The two instruments in connection with each other are utterly inexplicable and unintelligible. They show no valid agreement; no actual sale; no such contract as can be comprehended or effectually carried out and enforced. It is impossible to understand from them that one party had sold and the other had purchased, or that there was any promise by the purchaser to pay the seller. It is also to be remarked that neither one of the instruments refers to the other. It is quite obvious that they utterly fail to establish any legal contract; and whether read separately or together they are equally incongruous, indefinite and absurd.

3. It is said that the situation of the parties and the subject matter of the transaction may be taken into consideration, in the construction of any particular sentence or provision of a written contract; and under this rule the defendant is liable. It is not the meaning of a portion, but of the entire contract, which is to be construed in the case as bar. Even

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if it was a sentence or provision of the agreement, I do not understand that the instrument can be contradicted or interpreted contrary to its language by the application of the rule referred to. Extrinsic circumstances cannot be employed in any such case to impair and render ineffective the express terms of a written contract. (1 *Green. Ev.* §§ 286, 287, 288.) The law sometimes supplies by its implications the want of express agreements between the parties, but never overcomes by implications the express provisions of parties. If they are illegal the law avoids them. (2 *Pars. on Con.* 27. *Co. Litt.* 210 a.) So if the meaning of the instrument is uncertain, the intention may be ascertained by extrinsic testimony, but it must be a meaning which may be distinctly derived from a fair and rational interpretation of the *words actually used*. If it be incompatible with such interpretation the instrument will be void *for uncertainty and incurable inaccuracy*. (2 *Pars. on Cont.* 77, 78.) Under these well settled principles I do not see that a valid contract can be established.

Upon the whole case I think the contract was void by the statute of frauds, and the judge erred in denying the motion for a nonsuit. For this error a new trial should be granted, with costs to abide the event.

[ALBANY GENERAL TERM, December 1, 1862. *Hogeboom, Peekham and Miller*, Justices.]

LUCINDA SAFFORD, administratrix, &c. *vs.* PETER HYNDS.

THE SAME *vs.* THE SAME.

HYNDS *vs.* SAFFORD.

ALEXANDER CROUNSE *vs.* PETER HYNDS.

Land was purchased, at a foreclosure sale, by H. as the agent of and for the benefit of C., with money furnished mostly by C. and in part lent him by H. The title was taken in H.'s name, without the consent of C. *Held* that the title was to be regarded as taken and held by H. for the benefit of C.; and that, upon a bill in equity being filed for that purpose, by C. a reconveyance by H. would be ordered.

And that a tender of the money advanced by H. for C. was not necessary to enable C. to maintain an action to compel a reconveyance of the property. *Held also*, that C. being the real owner of the property, under an equitable title, and S. being in possession rightfully, by the consent and authority of C., he had such a right to the possession as entitled him to maintain an action of trespass, against H. and to recover for any damages done to his possession by the latter.

An agent, appointed to attend a foreclosure sale and bid off the property for the benefit of his employer, has no right to purchase the same in his own name. When an agent thus exceeds his authority, the purchase will be held to be made for the benefit of his principal, at the election of the latter; even though the agent takes the title in his own name.

Although it is sufficient, *prima facie*, for the plaintiff, in ejectment, to show a right of possession in himself, under a foreclosure sale, yet if the defendant can show an equitable right to the possession in a third person, under whom he claims, this evidence will be legitimate and proper, and will constitute a complete equitable defense to the action.

The provision of the statute, declaring that where a grant for a valuable consideration is made by one person and the consideration paid by another, the title shall vest absolutely in the alienee, does not apply to a case where the deed is taken in the name of one acting merely as agent, with the consent of the person paying the consideration.

A PPEALS from judgments rendered upon decisions of the judge at the circuit. These actions were all tried together, at the Schoharie circuit, by consent, before Justice HOGEBOOM, without a jury. They all related to the title to a lot of land in Seward, Schoharie county.

The first two actions were commenced in a justice's court, for trespass on the lot, and title having been pleaded, they were continued in the supreme court. The third was eject-

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ment for said land, in which an equitable title was interposed as a defense; the defendant justifying under Alexander Crounse, the plaintiff. The fourth case was an equitable action to compel the defendant Hynds to give a deed of said lot to the plaintiff.

In April, 1853, Lucinda Safford the wife of ——— Safford deceased, being the owner of an acre of the premises in question, executed a mortgage upon it, for \$125, to Henry Snyder. This mortgage, by assignment, came to the hands of Philip P. Hilton, who commenced proceedings to foreclose it by advertisement under the statute—the sale under the notice of foreclosure was to take place at Hyndsville, Schoharie county, April 10, 1858. John Crounse jr. was the agent for and on behalf of his brother Alexander Crounse, which Hynds knew. Alexander held a debt against Safford of about \$60, for leather and other things. Mrs. Safford was desirous that Crounse should bid in the property at the mortgage sale. Crounse got Hynds to bid it off for him, Crounse, in behalf of Alexander. Accordingly, on the day of the sale, and a short time before it took place, Hynds agreed with John to attend at the sale and bid off the property for his brother Alexander. John had raised \$110 of money belonging to his brother, which he furnished to Hynds towards paying for the bid, and Hynds agreed to lend the balance of the amount that might be necessary to pay the bid. Hynds and John attended the sale and Hynds bid the property in, for \$135. There was a surplus of about \$10 coming to Mrs. Safford, and John went over to her house with her husband and got her receipt for it and paid it to Hilton. Hynds, without the consent of Crounse, had the affidavits of sale made out in his own name and they were recorded. On the 14th of May, 1860, Hynds demanded possession of the lot, of Lucinda Safford and her husband, and gave them notice to quit. On the 14th of May, and also on the 16th of May, he entered upon the lot by force and against their will, with his men and teams, ploughing and taking away the manure

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and cutting down the fruit trees. Two of the suits were brought for these alleged trespasses. Afterwards, and on July 19, 1859, Alexander Crounse caused a tender to be made to Hynds of \$31 in gold and silver, which was brought into court, and demanded the execution of a quit-claim deed, which he refused to give.

On the 22^d of August of the same year Hynds commenced an ejectment suit against Safford. Safford died pending the proceedings and his wife was appointed administratrix. Immediately after the sale, Safford made an agreement with Crounse to remain in possession as the agent for Crounse. The principal question of fact litigated on the trial was, whether Hynds bid the property off as the agent for Crounse. The judge decided against him on the question of fact, giving the plaintiff \$5 damages in the two trespass suits, and costs; and in the ejectment suit dismissed the complaint with costs, and adjudged in the equity suit that Hynds convey the property to Crounse, and pay costs of the action. Judgments were entered for the costs, and Hynds appealed.

H. Smith, for the appellant.

L. Tremain, for the respondents.

By the Court, MILLER J. I. I think that the judge on the trial properly decided that Safford was rightfully in possession of the premises and could maintain trespass. Safford claimed possession under Crounse, who had an equitable title to the property. According to the judge's decision (which I think there is sufficient evidence to sustain) the purchase at the foreclosure sale was made by Hynds as the agent of and for the benefit of Crounse, with money furnished mostly by Crounse and in part borrowed of Hynds. The title was taken in Hynds' name without the consent of Crounse who was the real purchaser through his agent Hynds. It was not the fault of Crounse that the title was not in him,

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and it was contrary to the intention of the parties that the papers were made out in Hynds' name. The title to property, taken under the circumstances proved and found by the judge in this case, would be regarded as taken and held for the benefit of Crounse, and upon a bill being filed a reconveyance, would be ordered. (1 *R. S.* 728, § 53. *Lounsbury v. Purdy*, 11 *Barb.* 490. 16 *id.* 382. 18 *N. Y. Rep.* 448 *White v. Carpenter*, 2 *Paige*, 238. *Reid v. Fitch and others*, 11 *Barb.* 399. 18 *N. Y. Rep.* 448.)

A tender of the money advanced by Hynds for Crounse was not necessary to maintain the action to compel a reconveyance of the property. According to the judge the money paid by Hynds, besides what was furnished by Crounse, was borrowed by Crounse. Hynds would therefore have a right of action to recover it back, but no formal tender to Hynds or demand of performance was required. Crounse being the real owner under an equitable title, and Safford being in possession rightfully by the consent and authority of Crounse, he had such a right to the possession as entitled him to maintain the action and to recover for any damages sustained to his possession. Hynds had no right to the possession and no legal title, and hence was liable as a trespasser.

II. There was no error in allowing Safford to show an equitable title in Crounse. Nor do I think that the trespass suits were commenced before a right of action to establish an equitable title had accrued. The point that a tender and demand of performance was necessary prior to a right of action, I have already discussed and disposed of. It appears to be quite clear that Hynds had no right to purchase the property in his own name, and when an agent thus exceeds his authority the purchase will be held to be made for the benefit of the principal, at his election, even although the agent takes title in his own name. (*Moore v. Moore*, 1 *Seld.* 256.)

So far as the equity case is concerned, it appears that the money paid by Hynds besides what was furnished by Crounse,

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and a sufficient amount to cover all that Hynds could justly claim, was actually tendered and brought into court.

III. The evidence showing an equitable title in Crounse was admissible. It was no doubt sufficient *prima facie* for Hynds to show a right of possession under a foreclosure sale. (*Lawrence v. Williams*, 1 *Duer*, 585.) Conceding this to be so, it was still proper for Safford to show an equitable right to the possession of the premises in Crounse, under whom he claimed. The same facts which would entitle Crounse to maintain an equitable action to compel Hynds to execute a conveyance to him, would be an equitable defense to Safford, as the tenant of Crounse. (*Code*, § 150. *Thurman v. Anderson*, 30 *Barb.* 621.) Safford was in possession of the premises claiming title under Crounse. He did not propose strictly to show title in a third person, but to prove a right of possession through another person under whom he claimed. This would constitute a complete equitable defense to Hynds' claim, and was legitimate and proper. It was not an attack on Hynds' title collaterally, but proof of a right of possession in himself under Crounse.

IV. I am also of the opinion that no error was committed by the judge in deciding that the real purchaser of the premises was Alexander Crounse, and that he was entitled to a deed. The evidence warranted such a conclusion, and I do not think that Hynds was in such a position as to avail himself of that provision of the statute which declares that when a grant for a valuable consideration is made to one person and the consideration paid by another, the title vests absolutely in the alienee. (1 *R. S.* 728, 1st ed. § 51.) The section relied upon only applies when the conveyance is taken in the name of another person with the consent and knowledge of the person paying the consideration, and is expressly qualified by section 53 of the same act. The deed being taken in the name of Hynds, the purchaser, without the consent of Crounse, Hynds was not within the prohibition

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of section 51. (*Hosford v. Merwin*, 5 Barb. 51, 56, 57. *Norton v. Stone*, 8 Paige, 222. See also authorities before cited.)

It follows that the judgments must be affirmed and a new trial denied, with costs.

[ALBANY GENERAL TERM, December 1, 1862. *Hogeboom, Peckham and Miller*, Justices.]

CUMMINGS vs. WARING.

Where one owns, and lives upon, a farm, and also owns another parcel of land which is entirely separate from, and not contiguous to, the homestead, his team, while driven upon a plank road in going to and from work on the detached parcel of land, is liable to the payment of half tolls, if such parcel is within a mile of the toll-gate.

The provision of the statute, in relation to plank roads and turnpike roads, declaring that "farmers living on their farms within one mile of any gate," &c., "shall be permitted to pass the same free of toll, when going to or from work on said farms," does not apply to such a case.

ACTION brought by the plaintiff in a justice's court, against the defendant as gate-keeper on the Rochester and Webster plank road, for penalties incurred in demanding and receiving tolls of the plaintiff for passing the gate; he claiming to be exempt from toll. The plaintiff was a farmer residing upon his farm, consisting of about ninety acres, in the town of Irondequoit, about a quarter of a mile west of the defendant's toll-gate. He also owned and worked another parcel of land, east of the gate, consisting of about seventeen acres, which was entirely separate and about a quarter of a mile distant from the ninety acre farm, which he worked in connection with the homestead, with the same men and teams; the men and teams being kept and fed at the house on the home farm, and the produce drawn from one parcel to the other, for storing and use; the barns upon the seventeen acres

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being unfit to store grain, but answering to store hay and straw. The plaintiff claimed to pass the gate of the defendant when going to and from the seventeen acre parcel, free of toll; and the defendant demanding and receiving toll of him (being half toll as allowed by law, he living within one mile of the gate,) the plaintiff brought this action against the defendant to recover forty-three penalties of five dollars each, for receiving the toll. The justice rendered judgment against the defendant for \$200, besides costs. From this judgment the defendant appealed to the Monroe county court, where the judgment was affirmed, and from the judgment of the county court the defendant appealed to this court.

D. Wood, for the appellant.

Geo. T. Parker, for the respondent.

By the Court, JAMES C. SMITH, J. The question in this case is whether the plaintiff was by law exempt from the payment of the tolls demanded by the defendant. The provision of the statute under which he claims exemption is in these words: "Farmers living on their farms, within one mile of any gate, by the most usually traveled road, shall be permitted to pass the same free of toll, when going to or from their work on said farms." (*Laws of 1851, ch. 107, § 1, sub. 6.*) The plaintiff owned, and lived upon, a parcel of land of ninety acres, west of the gate at which the tolls were demanded, and also owned another parcel, east of the gate, of about seventeen acres, which was entirely separate from the west piece, and about a quarter of a mile distant from it; and his servant, of whom the tolls were demanded, was at the time going to and from the work of the plaintiff, on the seventeen acres.

I do not think the plaintiff is within the provision above referred to. Its language is clear and explicit. "Farmers living on their farms," &c., are exempt when "going to and

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from their work on *said* farms;" that is, on the farms on which they live. The two parcels of land were not contiguous; each had a dwelling house upon it; and the plaintiff lived on the west piece, and had lived there forty years, and never lived on the other.

The plaintiff claims, however, that the east parcel, although it did not adjoin the home farm, is to be regarded as a *part* of it. That in this respect it is like a wood lot or any other outlying parcel, used in connection with the main body of land, and necessary to make the whole a complete farm. But this position is not warranted by the evidence. It does not appear that the land east of the gate was essential to the completeness of the ninety acre piece, as a farm. It had a barn, as well as a dwelling house of its own, so that it could be carried on as a farm separately. The greater part of it was in fact worked by itself, after the plank road was built, till 1861, the year in which the tolls were demanded. In that year the dwelling house was occupied by tenants of the plaintiff, and although he worked the land, he employed no additional hands or teams, no alterations were made in the buildings on either farm, and the east farm remained in a condition to be again rented or carried on by itself whenever an opportunity should occur. In short, the use of it by the plaintiff himself, in 1861, was merely temporary, and the two parcels were then as essentially separate farms as they had previously been, or as they would have continued to be if the east farm had been worked by the tenants who lived on it, and the plaintiff had received its proceeds in the shape of rent instead of crops raised by himself. The ground of the plaintiff's claim is therefore narrowed down to the circumstance that, during the year in which the tolls were demanded, the seventeen acre piece as well as the home farm was *worked by him*, and the man and team employed on it were kept and fed upon the home farm.

In other words, the judgment below cannot be sustained, except by holding that the statute permits farmers living

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within one mile of the gate, to pass free of toll, in going to and from their work on *any* of their farms. But precisely this was the law before the act of 1851, and that act was intended to change it, in respect to the very point under consideration. Section 2, ch. 360, of laws of 1848, which was in force when the act of 1851 was adopted, was in these words: "Any company formed under said act (the act of 1847) may take half the rates of tolls, and no more, provided for in said act, from persons living within one mile of the gate at which it is taken; but no tolls shall be taken from farmers going to and from their work on *their farms*."

The intention of the legislature to make the change above adverted to, is also obviously manifested in section 4 of chapter 546 of the laws of 1855, which amends the section just cited, so that the last clause thereof is as follows: "but no toll shall be taken from farmers going to or from their work on their farms, *on which they reside*," &c.

The case of *The Commonwealth v. Carmalt*, (2 Binn. 235,) cited by the plaintiff's counsel, is not in point. The language of the statute material to the question there decided was this; "when passing from one part of his or her farm to the other along the said road." So in *The Newburgh and Cohecton Turnpike Company v. Belknap*, (17 John. 33,) the language was, "or to or from his common business on his farm," &c. In neither case was there any express words of restriction similar to those in the acts of 1851 and 1855, above referred to, but the statutes before the court in those cases were, in respect to the question under consideration, substantially the same as our statute of 1848, above cited, in its original shape.

I am of the opinion that the plaintiff was liable to pay the tolls demanded, and that the judgment of the county court and that of the justice should be reversed.

Ordered accordingly.

PAYNE vs. SLATE & GARDNER.

In respect to their creditors, copartners, after the dissolution, are joint debtors, and nothing more. What the joint makers of a promissory note may not do to enlarge, prolong or continue existing liabilities, or to create a new one in regard to the debt, copartners, after dissolution, may not do. And whoever makes a promise or an acknowledgment, either orally or in writing, or by a payment of principal or interest, which is to have the effect to rescue a debt from the force of the statute of limitations, must be the party to be charged, or be duly authorized by the party to be charged. One copartner cannot, after the dissolution of the firm, bind his copartner by a new promise, or revive a debt barred by the statute of limitations by a promise, or by a payment of principal or interest, made either before or after the lapse of the six years mentioned in the statute.

Where the plaintiff left with the defendants a sum of money, taking from them a receipt for the amount, specifying that it was "to his credit on our books, at six per cent interest," but containing no promise, and mentioning no time of payment; *Held* that this was to be construed as a loan or deposit of money to be repaid on demand, with interest.

And that no action would lie to recover the money, mentioned in the receipt, until after an actual demand and refusal.

A PPEAL by the defendants from a judgment entered upon a verdict at the circuit, and from an order denying a motion to set aside the verdict and for a new trial.

G. G. Reynolds, for the plaintiff.

J. C. Carter, for the defendant Gardner.

By the Court, BROWN, J. On the 9th of May, 1848, the plaintiff loaned or left with the firm of Slate, Gardner & Howell, the sum of \$1000, and took from them a receipt of which the following is a copy :

"\$1000.

New York, 9th May, 1848.

Received from Captain William H. Payne one thousand dollars, which is to his credit on our books at six per cent interest.

SLATE, GARDNER & HOWELL."

The firm at that time was composed of the defendants and one Silas S. Howell, since deceased. In April, 1850, the firm was dissolved and a new copartnership formed, composed

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of Slate & Gardner and one James H. Lyles, under the name of Slate, Gardner & Co., which assumed and undertook to pay the debts of the dissolved firm. Howell died about this time. In June, 1850, Slate, Gardner & Co. paid two years' interest on the money. They also paid one year's interest in April, 1851, and another year's interest in May, 1852. On the 27th of January, 1853, Slate, Gardner & Co. dissolved their business connection, to take effect from December 31st, 1852; Gardner at the same time assigning all his interest in the property and effects of the firm to Slate & Lyles, who continued the firm business under the name of Slate & Co. and agreeing to pay all the debts and liabilities of Slate, Gardner & Co. including that to the plaintiff, which is the subject of this action. This latter firm continued to pay interest on the money, down to the year 1859. This action was commenced on the 27th of November, 1861, and the complaint alleged a demand of payment of the debt in June, 1861. This fact is not denied in the answer, nor is it alleged that any other demand was at any time made. The defense of the defendant Gardner is the statute of limitations; that the plaintiff's action did not accrue within six years before the commencement of the action. The issue was tried before Mr. Justice LOTT, at the Kings circuit, in April, 1862, when the plaintiff had a verdict. A motion was afterwards made at the special term, to set aside the verdict and for a new trial, which was denied. From the judgment entered thereupon the defendant Gardner appealed.

If the debt is deemed to have become due and payable the moment the money was left with Slate, Gardner & Howell, (which I shall presently attempt to show it was not,) then I think the defense of the statute of limitations is made out, for it has been definitely settled, in this state certainly, that one copartner could not, after the dissolution of the firm, bind his copartner by a new promise, or revive a debt barred by the statute of limitations by a promise or by a payment of principal or interest, made either before or after the lapse

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of the six years mentioned in the statute. In *Shoemaker v. Benedict*, (1 Kern. 184,) Mr. Justice Allen furnishes a synopsis of what was decided and recognized as law in the leading case of *Van Keuren v. Parmelee*, (2 Comst. 523,) in these words: "1st. The action is substantially though not in form upon the new promise. And that such promise is not a mere continuation of the original promise, but a new contract springing out of and supported by the original consideration; 2d. That to continue or renew the debt, there must be an express promise to pay, or an acknowledgment of the existence of the debt, with the admission or recognition of an existing liability to pay it, from which a new promise may be inferred; 3d. That such acknowledgment or promise to take a debt out of the statute must be made by a party to be charged, or by some person authorized; and 4th. That there is no mutual agency between joint debtors, by reason of the joint contract, which will authorize one to act for and bind the others in a manner to vary or extend their liability." *Dean v. Hewit* (5 Wend. 257) decided that it made no difference whether the new promise was made before or after the statute had attached. When made after, the effect is to revive the debt, and when made before it has the same effect; it keeps the claim alive; so that on "an acknowledgment made at the end of five years the remedy is not lost till the expiration of eleven years after the first action accrued." There is but one other point material to the determination of the question I am considering in this action, and that is the effect of a payment; and that arose and was disposed of in the case of *Shoemaker v. Benedict*, (*supra*.) Considering that the liability of the party charged, if it exists, arises upon contract—express contract—it is manifest upon principle that whatever is relied upon to charge the party and rescue the debt from the destroying force of the statute must operate upon the contract by renewing the old or creating a new one. The action is still upon the contract, and one must be recognized or established within the period of six years. In the

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case last referred to Mr. Justice Allen says, what must command universal assent: "As a fact by itself a payment only proves the existence of the debt to the amount paid, but from that fact courts and juries have inferred a promise to pay the residue. In some cases it is said to be an unequivocal admission of the existence of the debt. And in the case of the payment of money as interest it would be such an admission in respect to the principal sum. Again, it is said to be a more reliable circumstance than a naked promise; and the reason assigned is that it is a deliberate act, less liable to misconstruction and misstatement than a verbal acknowledgment. So be it. It is nevertheless only reliable as evidence of a promise or from which a promise may be implied." The case of *Van Keuren v. Parmelee* arose upon a note given by copartners in the name of the firm. That of *Shoemaker v. Benedict* upon a note signed by three individuals as joint makers; and so were the cases of *Winchell v. Hicks*, (18 N. Y. Rep. 558,) and *Reed v. McNaughton*, therein referred to. The counsel for the plaintiff contends there is a material difference between the liability of copartners and the joint makers of a promissory note, and claim that payments made by copartners, after dissolution and before the debt is barred, prevent the operation of the statute. The argument is founded upon the theory that for certain purposes (including the payment of obligations) the partnership continues after dissolution. This is doubtless true. But the question still occurs, does it continue for the purpose of creating new liabilities, or reviving those which time has extinguished. The obligation of the copartners to pay their debts due to creditors is not affected by the dissolution. It remains the same, and the discharge of this obligation is not rightly denominated a power. It is simply the discharge of an existing liability, and its effect after dissolution, upon the copartner, is limited to the appropriation of the effects of the firm to that extent. The powers which survive incidentally to the copartners after dissolution are those necessary to the final adjustment and

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liquidation of the affairs of the concern. In *Darling v. March*, (22 *Maine Rep.* 184,) Shepley, J. gives the effect of the dissolution, in these words: "The dissolution operates as a revocation of all authority for making new contracts. It does not revoke the authority to arrange, liquidate, settle and pay those before created. For these purposes each member has the same power as before dissolution. If an account existing before the dissolution be presented to one of the former partners, he may decide whether it should be paid or not, even though it be a disputed claim. He may decide whether due notice has been given on commercial paper, and may make or refuse payment accordingly. The waiver of demand and notice is but a modification of an existing liability by dispensing with certain testimony which would otherwise be required," &c. This authority results from the nature of a copartnership which has engagements that cannot be fulfilled during its continuance, and which in many and perhaps most cases, must be fulfilled from moneys realized from the collection of debts and the conversion of assets after dissolution. In respect to their creditors copartners, after dissolution, are joint debtors, and nothing more. What the joint makers of a promissory note may not do to enlarge, prolong or continue existing liabilities, or to create a new one in regard to the debt, copartners after dissolution may not do. And whoever makes a promise or an acknowledgment either orally, in writing, or by a payment of principal or interest, which is to have the effect to rescue a debt from the force of the statute of limitations must be the party to be charged or be duly authorized by the person to be charged. For these reasons I think that if the debt in controversy in this action became due more than six years before its commencement, the defendant Gardner is discharged from his liability, and as to him the action cannot be maintained.

Was the debt so due and payable? If so, how and when did it become so due and payable, and by what means, whether by force of the contract itself, or by force of some

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act done by the parties, or some of them, outside of the contract, and in conformity with its terms express or implied? The contract exists in the form of a receipt for one thousand dollars placed to the credit of the plaintiff upon the books of the defendant, at six per cent interest. The written paper is silent as to the time of repayment; indeed it does not speak of repayment at all; but as it was not to be applied in the payment of a debt or to any designated use, but was placed on the books of the defendants' firm to the credit of the plaintiff at six per cent, the implication is that it was to be repaid sooner or later, with the accruing interest. It seemed to be conceded upon the argument, and indeed I can perceive no other sensible interpretation to be put upon it, than that it was a loan or deposit of money, to be repaid on demand with the interest. In *Wenman v. The Mohawk Insurance Co.* (13 *Wend.* 267,) it was treated as a question of intention to be gathered from the written contract; and so also in *Sweet v. Irish*, (36 *Barb.* 467,) where we had occasion to examine it. The acts of the parties can admit of but one construction. The plaintiff intended to put his money at interest, and for that purpose left it with Slate, Gardner & Howell. They, on the other hand, intended to use the money for business purposes, where it would be productive, and from which use they would be able to remunerate the plaintiff with interest at the rate designated in the instrument. Neither of them intended it should be due and payable presently, because that would defeat the purposes which both lender and borrower intended to effect. It was either payable presently, and the lender had a right of action therefor immediately and without the performance of any precedent condition, or it was not payable until an actual demand. And if the intention of the parties, signified by what they did is to govern, there cannot be any doubt that they meant the loan to be one on time; time not defined in the written contract, but by an actual demand of payment thereafter. The case of *Merritt v. Todd*, (23 *N. Y. Rep.* 28,)

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wrought as great a change in what had theretofore been deemed by the profession as the law of promissory notes, payable on demand with interest, as the case of *Van Keuren v. Parmelee* wrought upon the law of partnership and the right of one copartner to bind the other after dissolution. In the former case the court were brought to determine between two alternatives in regard to notes payable on demand with interest—whether the demand might be made at any time, so as to charge the indorser, or whether he is discharged unless the demand be made with due diligence; diligence in the sense of the commercial law, and without reference to time, credit or indulgence given to the maker; but diligence having reference solely to the convenience of the holder, making all proper allowance for the residence of the parties, whether in the same town or elsewhere, and the distance they reside from each other. The court reached this conclusion, and so determined that a promissory note payable on demand with interest is a continuing security; and an indorser remains liable until an actual demand, and the holder is not chargeable with neglect for omitting to make such demand within any particular time. Had the obligation of Slate, Gardner and Howell taken the form of a note payable to William H. Payne or order on demand, with the interest, which would have been an immaterial change so far as the time of payment is concerned; and had indorsed the same over to a third person, Payne, upon notice of presentation and non-payment in June, 1861, would have become fixed, and his liability as indorser have become complete at that time, because then for the first time, upon the authority of *Merritt v. Todd*, the note would have become due and payable.

Howland v. Edmonds, decided in the court of appeals in March, 1862, and reported in 23 *Howard's P. R.* 152, does not conflict with *Todd v. Merritt*. That was not a loan of money, nor was it a loan on interest expressed in the contract. It was upon a stock note given to a mutual insurance com-

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pany, as part of its capital, payable "in such portions and at such time or times as the directors of the company may, agreeably to their act of incorporation, require." It is distinguishable in its material features from the note in *Merritt v. Todd*. The opinion, after stating the general rule that a note payable on demand may be prosecuted immediately, the suit being a sufficient demand, and that any other similar expressions used, as on request, or on being called upon, the law is the same, and no demand is necessary before suit brought, proceeds in this significant language. "When the thing promised is the payment of a sum of money no actual demand will in general, as we have said, be necessary, notwithstanding the terms of the contract; but it is, nevertheless, in the power of the parties so to frame their engagements as to make a preliminary demand essential. And so, likewise, though there be nothing in the terms of the instrument to take the case out of the general rule, the attending circumstances and the nature of the duty may be such that the words which mention a demand or request will have a special significance, and require a preliminary demand to be made." This is precisely what is asserted in *Merritt v. Todd*, and what is claimed in the case under consideration. Judge Denio refers to *The Goshen Turnpike Co. v. Hurtin*, (9 John. 217,) which was an action upon a promissory note given to the company for the value of five shares of its capital stock, payable in such manner and proportions and at such time and place as the plaintiffs should from time to time require. Also *The Dutchess Manufacturing Co. v. Davis*, (14 John. 238,) which was an action on a subscription to the stock of the plaintiff's company payable in the same manner.

It seems to me that in receding from the rule which heretofore prevailed upon this class of notes in respect to the indorser, the courts must also recede from it in regard to the maker. It would be contradictory and absurd to say that such a note is due and payable immediately and without any demand, for the purpose of maintaining an action against

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the maker, but that in order to charge the indorser it is not due and payable until an actual demand is made of payment from the maker. The courts must be prepared to adopt the necessary results of their own decisions, which are designed to be rules of action for the government and determination of all cases falling clearly within their principles. If the plaintiff's money had been deposited in a banking incorporation, and upon a receipt or certificate similar in all respects to that in this action, the money would not have become due and payable, and no action could have been maintained to recover it until after an actual demand and refusal. (*Downes v. Phoenix Bank of Charlestown*, 6 Hill, 297, and the authorities there referred to.) I am unable to find any distinction between the two cases.

The judgment should be affirmed.

[DUTCHESS GENERAL TERM, May 11, 1863. *Brown, Scrugham and Lott, Justices.*]

CHAMBERLAIN and others vs. CAMPBELL, Sheriff &c.

The jail limits of the county of Kings were fixed by the statute of 1831, which declared that "the jail liberties of the county of Kings shall be so extended as to include the whole of the towns of Flatbush and Brooklyn in said county." In 1834, by an act incorporating the city it was declared that the town of Brooklyn should thereafter constitute and be known by the name of the city of Brooklyn. And by the act of April 17th, 1854, the cities of Brooklyn and Williamsburgh and the town of Bushwick were consolidated into one municipal government and city, to be known as the city of Brooklyn. Held that the extension of the jail liberties, by the act of 1831, so as to include the whole of the towns of Flatbush and Brooklyn, carried the limits to the exterior lines of those two towns, which were fixed and known boundaries; and that the subsequent creation of a municipal corporation known as the city of Brooklyn, with a large addition to its territory, could not be regarded as affecting the jail limits, so as to make them co-extensive with the bounds of the city.

The jail, of which the sheriff has the control, is not a municipal institution,

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nor needed for municipal purposes. It is a county institution, used exclusively for county purposes. And the jail liberties are but an enlargement of the limits or outer walls of the jail.

Any change which the legislature may make in the limits of the town or city cannot be regarded as affecting the limits or liberties of the jail, without some additional words indicating such a purpose.

MOTION for judgment, upon a special verdict.

By the Court, BROWN, J. The plaintiffs obtained a warrant of arrest against one David W. Cornwell upon which he was arrested and held to bail in an action in which they afterwards obtained judgment for the sum of \$4098, the judgment roll of which was filed in the office of the clerk of the county of Kings. An execution against the person of Cornwell was duly issued to the sheriff of the county of Kings, the predecessor of the defendant, upon which Cornwell was arrested and admitted to the jail liberties of the county. In January, 1861, the sheriff, upon the expiration of his term of office, delivered over the person of David W. Cornwell, with the execution against his person and the bond for the jail liberties, to the defendant Anthony F. Campbell, who was his successor in office.

This action was commenced on the 14th day of March, 1862, at which time, as the proof showed, Cornwell was at the corner of South Second and Fifth streets in the city of Brooklyn, where he had a place of business. The result of the action turned exclusively upon the question whether the corner of South Second and Fifth streets is within the jail limits of the county of Kings. These were fixed by the statute of 1831, which declared that "the jail liberties of the county of Kings shall be so extended as to include the whole of the towns of Flatbush and Brooklyn in said county." No subsequent act has been passed on the subject. It was proved upon the trial, by Silas Ludlam, a city surveyor of Brooklyn, that the corner of the streets referred to, and where Cornwell was at the time the action was commenced,

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was outside the limits of the towns of Brooklyn and Flatbush, as they existed in 1831. In 1834, by an act passed to charter the city, it was declared that the town of Brooklyn should thereafter constitute and be known by the name of the city of Brooklyn; and by the act of the 17th April, 1854, the cities of Williamsburgh and Brooklyn and the town of Bushwick, were consolidated into one municipal government to be known as the city of Brooklyn. The place in controversy is now within the limits of the city. It must be remembered however, that the jail liberties are those of the county of Kings, and they were extended by the act of 1831, so as to include the whole of the towns of Flatbush and Brooklyn. This carried the limits to the exterior lines of those two towns, which were fixed and known boundaries; and the subsequent creation of a municipal corporation known as the city of Brooklyn, with a large addition to its territory, cannot by any rule of interpretation be regarded as affecting the jail limits, which is a subject not mentioned in the act, and entirely foreign to the purposes it was intended to effect. The town and the city of Brooklyn are territorial divisions for local and municipal government. The sheriff is not a town or a city officer; nor is the jail of which he has the exclusive control a municipal institution, or needed for municipal purposes. It is every where throughout the state a county institution, used exclusively for county purposes; the counties representing the ancient bailiwick of the sheriff. The jail liberties are but an enlargement of the limits or outer walls of the jail. Any change which the legislature might make in the limits of the town or city could by no reasonable construction be regarded as affecting the limits or liberties of the jail without some additional words indicating such a purpose. The general law for alterations in the jail liberties, to be found in §§ 35, 36 of *art. 3, title 6, ch. 7*, of the revised statutes, as modified by the act of 1851, provides that they may be altered by the county court in its discretion, not oftener than once in three years, subject to

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the restrictions prescribed in § 34 of the act in respect to the form and extent of the limits; such alterations with the boundaries and limits of the liberties as altered, to be designated in the order of the court. These provisions indicate an intention that the jail liberties shall be designated with exactness and precision.

Judgment should be entered in favor of the plaintiff upon the verdict.

[DUTCHESS GENERAL TERM, May 11, 1863. *Brown, Scrugham and Lott, Justices.*]

 FARRINGTON vs. THE PARK BANK.

The title of the owner of property in things movable can be divested and passed over to another only by his own consent and voluntary act, or by operation of law.

If his consent and voluntary act is made and signified by an agent or person acting in his behalf, such agent or person must have the requisite authority from his principal for that purpose.

A promissory note past due and dishonored, and which has been protested for non-payment, although it passes by delivery, and an action may be maintained upon it, by the holder, subject to the equities of the parties thereto, cannot be said to pass in the usual course of trade and business. Although such paper will pass by delivery, and the holder may maintain an action upon it, the substantial elements of commercial paper for the purposes of trade are wanting, in the absence of an unqualified obligation of the parties to it to pay at maturity.

The holder takes it in the light of an assignee of the person from whom he receives it, rather than as an indorsee according to the usage of trade; and he therefore takes just such title, and no other, as his assignor had to it, at the time of the transfer.

Where B., being authorized by the owners of a protested note, as their agent, to take it to a particular bank and leave the same with the bank for collection, but without authority to sell or pledge it, converted it to another and a different purpose, by depositing it for collection on his own account and to be held as security for his indebtedness; *Held* that no title passed to the bank; B. having no power to make a sale or transfer in the nature of a pledge which would divest the owners of their interest in the note.

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APPEAL from a judgment entered upon the report of a referee. The action was brought to recover the proceeds of a note, made by the Houston and Texas Central Rail Road Company, and deposited with the defendant for collection. The referee reported in favor of the plaintiff, and the defendant appealed from the judgment.

S. W. Fullerton, for the plaintiff.

E. L. Fancher, for the defendant.

By the Court, BROWN, J. At the time James Bigler left the note of the Houston and Texas Central Rail Road Company with the Park Bank, the defendant, for collection, he was not a joint owner thereof as copartner with D. Farrington & Son. That relation and interest had existed at the time the note was made. The note had, however, been discounted at the Bank of Newburgh and the proceeds carried to James Bigler's credit. When it fell due it was protested, and remained unpaid by the makers. It was afterwards paid by D. Farrington & Son, with their own means, and pledged by James Bigler to them, to secure the repayment of the money advanced, to take it out of the Bank of Newburgh. This fact is found by the referee and is not open to dispute upon this appeal. So that for all the purposes of this action Farrington & Son are to be deemed to have been the sole owners of the note at the time it was delivered over to the Park Bank. This view frees the case from some complication and leaves the result to depend upon the consideration of a single question, and that is the power of James Bigler to transfer the note to the Park Bank, so as to give it a title thereto, and to the proceeds thereof, superior to the right and title of D. Farrington & Son.

The object of the action is to recover the proceeds of the note. The referee has found that the note remained in the Bank of Newburgh until the 10th of April, 1859, when it

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was taken therefrom by Bigler, at the request of Farrington & Son, and left with the defendant to be forwarded to Texas for collection; at which time the agreement was again stated and ratified, that the proceeds should be applied to the payment to Farrington & Son of the money advanced by them to take the note up. The referee also finds that on the 11th of April, 1859, Bigler left the note with the defendant to be forwarded by it to Texas for collection, on his own account, and without disclosing the fact that it had been pledged to or was the property of the plaintiffs. The note was so forwarded, and was collected in Texas for the bank, and the proceeds thereof, amounting to \$3151.40, received by it on the 16th of November, 1859. That previous to the 25th of August, 1859, and during that year, Bigler had a large line of discounts at the bank and had large sums of money collected by it for him on paper left for collection. And that at various times between the 11th of April and the 25th of August, 1859, Bigler agreed with the bank that it might hold all notes left with it by him for collection, including the note of the Houston and Texas Central Rail Road Company, as security for his indebtedness to and accruing out of his dealings with the bank. That upon the faith of such agreement and pledge the bank, during the period named, made discounts and advances to Bigler, who has since that time failed and become insolvent. That the proceeds of the note of the rail road company have been applied to pay the debt of Bigler to the bank. The referee also finds that the money has been duly demanded by the plaintiffs from the bank, who refused to pay the same. He made a report in favor of the plaintiff, upon which judgment was entered, and the defendant appealed.

Two material facts are established by the finding of the referee. 1st. That Farrington & Son were the owners of the note of the rail road company, and that the Park Bank acquired whatever title they have to the same as purchasers or pledgees from Bigler in good faith and for value. We

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have been referred to a series of cases, of which *Mowrey v. Walsh*, (8 Cowen, 243,) is an example, wherein the title of a purchaser in good faith from a fraudulent vendee is held to be good against the claim of the original owner. Thus when the goods were obtained at a sale on credit under a forged recommendation and guaranty, and also when the goods were purchased upon credit and in contemplation of immediate bankruptcy, and afterwards sold to a purchaser in good faith in the usual course of trade, the title of the bona fide purchaser is held valid against the claim of the defrauded vendor. The reason is obvious. Here is an intention to part with the property in the goods, and the fraudulent vendee has all the indicia of ownership; and although the consent of the owner to part with his property in the goods has been obtained under circumstances which entitle him to revoke and rescind it, he must assert and exercise this right of rescission before an innocent purchaser in good faith has acquired his title. In short the sale to the fraudulent vendee is not void but voidable at the instance of the defrauded vendor, and until he exerts his right to avoid the sale the title of a purchaser in good faith from the fraudulent vendee will prevail and be protected. The cases in which this doctrine is found have no analogy to the present. Bigler was not a fraudulent purchaser of the note of the rail road company. He was not a purchaser of any kind. He took the note to the Park Bank, as the agent of the Farringtons, for a particular purpose, and converted it without authority to another and a different purpose. Unless there is something in the nature of the property in question, which excepts it from the operation of the general rule, Bigler could make no sale or transfer in the nature of a pledge which would divest the Farringtons of their interest in the note. They were the owners. Bigler was their agent or messenger. His authority was special, and limited to a particular act, and that was to carry the note to the Park Bank and leave it there for collection. He had no authority to sell it, or pledge it, but simply to deposit

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it with the bank to be collected. The title of the owner of property in things movable can be divested and passed over to another only by his own consent and voluntary act, or by operation of law. And if his consent and voluntary act is made and signified by an agent or person acting in his behalf, such agent or person must have the requisite authority from his principal for that purpose. There are exceptions to this rule—exceptions arising out of the nature and character of the property or thing which is the subject of the sale and transfer, and the uses and purposes to which it is devoted. Amongst these are coin, bank bills, checks and notes, payable to bearer, and which pass by delivery, and circulate as currency. The holder of a bill of exchange, check, bank note or other note transferable by delivery, who has acquired it in good faith in the usual course of business and for value, may maintain an action against the maker, drawer, indorser or acceptor, although it may have been lost by or stolen from the true owner. *Miller v. Race*, (1 Burr. 452,) was an action of trover upon a bank note for the payment of twenty-one pounds ten shillings to one William Fenny or bearer, on demand. The note had been stolen, with other bank notes, from the mail, and came into the hands of the plaintiff for a full and valuable consideration in the usual course of business, and without notice or knowledge that it had been stolen. Fenny applied to the bank to stop its payment, which was done. Afterwards the plaintiff applied to the bank for payment, and for that purpose delivered it to the defendant, a clerk in the bank, who refused to pay the note or redeliver it to the plaintiff. The court held that he should recover. The reason given for the judgment is that bank notes are “not goods,” nor securities, nor documents for debts, nor so esteemed, but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. So in case of money stolen, the true owner cannot recover it after it has been paid away -

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fairly and honestly upon a valuable and bona fide consideration. *Peacock v. Rhodes*, (*Douglas*, 633,) was an action upon an inland bill of exchange drawn by the defendants upon Smith, Payne & Smith, payable to William Ingham or order, thirty-one days after date. It was indorsed by Ingham and passed by divers indorsements to one Fisher, from whom it was stolen and passed to the plaintiff without notice, in payment of a bill of goods sold to one Brown at the time. The plaintiff had a verdict, which the court refused to set aside. In giving the opinion, Lord Mansfield said: "The holder of a bill of exchange is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned subject to all the equity to which the original party was subject. If this rule be applied to bills of exchange or promissory notes, it would stop their currency. The law is settled that a holder coming fairly by a bill or note has nothing to do with the transaction between the original parties, unless perhaps in the single case of a note for money won at play. I see no difference between a note indorsed in blank and one payable to bearer. They both go by delivery, and possession proves property in both cases." (*See also Chitty on Bills*, 10th ed. 255, and the cases referred to in the notes.) I have quoted from the opinions in these early cases to exhibit the reasons for the rule laid down. Money stolen cannot be recovered after it has been paid away fairly and honestly, because it has passed in currency by reason of the course of trade which creates a property in the assignee or bearer. A bill of exchange with a blank indorsement is good in the hands of a holder in good faith for value, though proved to have been stolen from the former owner; because the owner is not considered in the light of an assignee of the payee, who must take subject to the equities of the original parties. And if the rule be applied to bills of exchange and promissory notes it would destroy their credit and stop their currency. This reasoning does not apply to a promissory note past due and dishonored and which has been

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protested for non-payment, as the note of the Houston and Texas Central Rail Road Company was. Such a note, although it passes by delivery and an action may be maintained upon it by the holder, subject to the equities of the parties thereto, cannot be said to pass in the usual course of trade and business. Such paper does not circulate for commercial purposes, and neither banks nor business men deal in it, or accept it in exchange for money or merchandise. Although it will pass by delivery, and the holder may maintain an action upon it, the substantial elements of commercial paper for the purpose of trade and business are wanting, in the absence of an unqualified obligation of the parties to it to pay at maturity. The holder takes it in the light of an assignee of the person from whom he receives it, rather than an indorsee according to the usage of trade, and he therefore takes just such title and no other as his assignor had to it at the time of the transfer. As James Bigler had no title to the note he could transfer none to the Park Bank.

For these reasons I think the judgment should be affirmed.

[DUTCHESS GENERAL TERM, May 11, 1863. *Brown, Scrugham and Lott, Justices.*]

THE PEOPLE, *ex rel.* George Opdyke, Mayor of the city of New York, *vs.* MATTHEW T. BRENNAN, Comptroller of the city and county of New York.

The act of April 24, 1863, directing the mayor and comptroller of the city of New York to designate four papers "having the largest daily circulation," in which corporation advertisements shall be published, requires the designation to be of the four papers published in the city, having the largest daily circulation, and is not to be so construed as to restrict such circulation to the city and county of New York.

If the comptroller refuses to meet the mayor and act with him, in the mat-

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ter, a *mandamus* will lie to compel him to unite with the mayor i. designating the four papers having the largest daily circulation; but as the determination of the question of fact which four papers have the largest daily circulation involves the consideration of evidence and an adjudication upon such evidence, the writ should not command the comptroller to unite with the mayor in designating four certain papers named therein.

THIS is an appeal from an order made at a special term directing a peremptory *mandamus* to issue commanding the respondent to unite with the relator in designating four newspapers published in the city of New York, having the largest daily circulation, viz : the "New York Herald," the "New York Sun," the "New York Tribune," and the "New York Times," in which to publish the advertisement in pursuance of section 2 of the act of the legislature, chapter 227, passed April 24th, 1863, which is as follows :

"No portion of the sums which shall hereafter be raised by tax or assessment in the city and county of New York shall be paid for advertising, except the same shall have been incurred for advertisements in the newspapers authorized by the mayor and comptroller of the said city, who shall designate four papers having the largest daily circulation, and any six others in their discretion, not to exceed ten in all."

The question was whether the "daily circulation" mentioned in the act means the daily circulation, or the circulation within the city. The mayor wished to name the "Herald," "Sun," "Tribune" and "Times," as such four papers, taking their aggregate of circulation *without reference to the localities in which they are circulated*. The comptroller insisted that the four papers selected should be those which have the largest circulation *within the city and county of New York*.

John E. Develin and *James T. Brady*, for the appellant.

David Dudley Field, for the relator.

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By the Court, SUTHERLAND, J. The words of the act are "four papers having the largest daily circulation." We have no right to add to this the words "in the city of New York." It is reasonable and probable, that the legislature intended that the advertisements should be published in the four papers having the largest daily circulation in the city of New York, but it is also reasonable and probable that the act was worded on the theory, that the four papers having the largest daily circulation generally would have the largest daily circulation in the city of New York. We think therefore, that the construction of the act by the mayor and by the justice who made the order appealed from was correct. But as the determination of the question of fact which four papers have the largest daily circulation, involves the consideration of evidence, and an adjudication upon such evidence, by the mayor and the comptroller, we do not see upon what principle a mandamus can issue commanding the comptroller to unite with the mayor in designating four certain papers, naming them in the mandamus. This court could, by mandamus, compel the mayor and comptroller to meet and act in the matter; but we do not think that we could compel them to act in a particular manner; that is, to unite in designating four certain papers named by the court. (*The People v. Dutchess C. P.* 20 Wend. 658. *Ex parte Bassett*, 2 Cowen, 458. *The Judges of the Oneida Common Pleas v. The People*, 18 Wend. 78. *Opinion of the Chancellor and cases cited.*)

We think the order appealed from should be modified, so as to order a mandamus to issue to the comptroller, directing him to unite with the mayor in designating the four papers having the largest daily circulation, generally.

[NEW YORK GENERAL TERM, July 11, 1863. *Sutherland, Leonard and Clarke, Justices.*]

TALMAGE and others, commissioners &c., *vs.* HUNTING.

Subdivision three of section one of the act of February 23, 1830, regulating highways in the counties of Kings, Queens and Suffolk, makes it the duty of the commissioners of highways "to cause such roads used as highways as shall have been laid out, but not sufficiently described, and such as were used as highways for twenty years or more next preceding the 21st of March, 1797, and which shall have been worked and used as such constantly for the last six years, but not recorded, to be ascertained, described and entered of record in the town clerk's office." *Held* that in executing this injunction of the statute the commissioners are not to lay out a new road, or to enlarge the limits of an old one.

The lands cannot be taken for either purpose without due process of law, and without awarding compensation therefor to the owners.

The commissioners are to ascertain the length and breadth, the lines and limits, of a road which had not been formally laid out, but which had become a public road by dedication of the landowners to be presumed from immemorial use; to incorporate a description of such length and breadth, lines and limits, in the form of an order; and enter it of record in the town clerk's office, as a memorial for present and future use.

Where commissioners, instead of ascertaining and making a record of the lines, length, breadth, courses and distances of an existing road as it had existed for twenty years before the 21st of March, 1797, alleged in their order that difficulties had arisen, as to the boundary lines of the street; that they had heard testimony and collected the circumstances relative thereto, and proceeded to survey, stake out and record such width of highway as appeared to be necessary for the public convenience; and they surveyed and staked out the road, not as it had been used and then actually existed; nor as the landowners had dedicated it; but of such width as appeared to be necessary for the public convenience; *Held* that the commissioners had no power to make such an order, and the same was void.

MOTION for judgment on a verdict taken at the circuit, subject to the opinion of the court at general term.

W. P. Buffitt, for the plaintiffs.

George Miller, for the defendant.

By the Court, BROWN, J. The plaintiffs are commissioners of highways of the town of Easthampton, in the county of Suffolk, and they claim to recover from Nathaniel Hunt-

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ing, the defendant, \$275, penalties incurred by him for the omission to remove certain encroachments alleged to have been made by him upon the south side of a street or public highway called Tower street, running through the village of Easthampton, in said town, pursuant to an order made by them to that effect, of the date of June 11th, 1859, and the verdict or certificate of a jury found thereupon. The street runs northeasterly and southwesterly, the lands of the defendant lying on the southeasterly side thereof. The jury found the encroachment to be a fence erected by the defendant in front of the dwelling house and land occupied by him, and projected eight feet into the street at the southwesterly end of the fence, and eight feet nine inches at the northeasterly end thereof. The answer put in issue most of the material facts set out in the complaint, and at the trial before Mr. Justice EMOTT, at the circuit held for the county of Suffolk, in June, 1862, a verdict was taken for the plaintiffs for \$275, subject to the decision of the court at general term.

We have recently had occasion to consider some of the legal questions involved in this action. In *Doughty v. Brill*, (36 Barb. 488,) we held that there can be no proceedings by commissioners of highways for an encroachment, in a case where the highway has not been laid out and recorded in conformity with the directions of the highway act. The road had not been surveyed, and no record thereof had been filed in the clerk's office. In rendering the decision we said: "The distinction between public highways laid out and allowed by law and public highways which become such by a user of twenty years and upwards, is recognized and maintained in the various provisions of title 1, chapter 16, in regard to bridges and highways. Thus, in the third subdivision of section one, it is made the duty of the commissioners of highways to cause such of the roads used as highways as shall have been laid out and not sufficiently described, and such as shall have been used for twenty years but not recorded, to be ascertained and described and entered of record in the town

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clerk's office. So, also, section 104 declares "all public highways now in use, heretofore laid out and allowed by any law of this state, of which a record shall have been made in the office of the clerk of the county or town, and all roads not recorded which shall have been used as public highways for twenty years or more, shall be deemed public highways, but may be altered in conformity with the provisions of this title." The first class become public highways by force and authority of proceedings had under the statute, and which assure compensation to the owners of the lands taken for that purpose, while the latter class become such by force of a rule of the common law, which presumes a dedication or grant from the public use for twenty years and more. The distinction is substantial and material. It was present to the minds of those who framed the law." There are some distinctions between the case referred to and that under consideration, which should be noticed. In the former the road had not been originally laid out, but became such by a user of twenty years and more. Nor had it been "ascertained, described and entered of record in the town clerk's office," as required by the third subdivision of section 1, title 1, chapter 16, revised statutes. In the present case the plaintiffs produced and read in evidence an order made by the commissioners of highways of the town of Easthampton, of the date of April 1st, 1833, which is claimed to have ascertained, described and entered of record in the town clerk's office "the highway in question, known as Tower street, in conformity with the third subdivision of section one of the act of the 23d of February, 1830, regulating highways, &c. in the counties of Kings, Queens and Suffolk, called the Long Island highway act. It had not been originally laid out under the highway acts, but had become a public highway by a user of twenty years before the 21st day of March, 1797, and worked and used for six years before the passage of the act. There is, also, a material difference in the language of these two acts in regard to the proceedings of the

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commissioners for an encroachment. In the general highway act, section 107 authorizes the commissioners to proceed "when a highway shall have been laid out and the same has been or shall be encroached upon." In the Long Island act the same authority is given "in every case where a highway has been or shall be encroached upon." Omitting the qualification that the highway shall have been laid out.

Subdivision three of the first section of the latter act makes it the duty of the commissioners "to cause such roads used as highways as shall have been laid out but not sufficiently described, and such as were used as highways for twenty years or more next preceding the 21st day of March, 1797, and which shall have been worked and used as such constantly for the last six years but not recorded, to be ascertained, described and entered of record in the town clerk's office." In executing this injunction of the statute the duties of the commissioners were quite plain. They were not to lay out a new road, or to enlarge the limits of an old one. The lands could not be taken for either purpose without due process of law, and without awarding compensation therefor to the owners. The commissioners were to ascertain the length and breadth, the lines and limits of a road which had not been formally laid out but which had become a public road by dedication of the landowners, to be presumed from immemorial use, to incorporate a description of such length and breadth, lines and limits, in the form of an order, and enter it of record in the town clerk's office, as evidence and a memorial for present and future use. In the case of *The People v. The Judges of Courtland County*, (27 Wend. 491,) the commissioners, it appeared, in performance of this same duty, altered the road, carrying one of the lines thereof a rod and a half into the field of the adjoining owner. Mr. Justice Bronson, in rendering the opinion of the court, says: "The legislature has enacted what the common law had already declared, that roads, although not recorded, which have been used as public highways for twenty years, shall be deemed public

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highways. (1 R. S. 521, § 100.) And it is the duty of the commissioners in the several towns to cause such roads to be ascertained, described and entered of record in the town clerk's office. (*Id.* 501, *sub.* 3.) This provision does not authorize the commissioners to say what was originally intended, either by the owner of the soil or any one else, in relation to the width or location of the road, any further than such intention has been manifested by permitting the way to be used. It is a power in relation to the road as it actually exists and has existed for the last twenty years. It does not authorize the commissioners to create or enlarge, but only to perpetuate the evidence of, a public right. But the extent and the fact of dedication depend upon the user, and the public must take *secundum formam doni*." There is reason to think that the commissioners who made the order of the 1st of April, 1833, upon which the plaintiffs rely, mistook their vocation. In place of ascertaining and making a record of the lines, length, breadth, courses and distances of an existing road as it had existed for twenty years before the 21st March, 1797, they say in the order that difficulties had arisen as to the boundary lines of the street; that they had heard testimony, and collected the circumstances relative thereto, and proceeded by virtue of the laws of the state regulating highways in Suffolk county, passed February 23, 1830, to survey, stake out and record such width of highway as appears to be necessary for the public convenience." They surveyed and staked out the road, not as it had been used and then actually existed, not as the landowners of Easthampton had dedicated it, but of such width as appeared to be necessary for the public convenience. This they could not do; for, as we have already seen, they had no such power.

In making the examination and survey, it appears by the order that the commissioners set stones or monuments in what they adjudged was the centre of the street, and then run the exterior lines 3 rods 92-100ths, distant therefrom in a southeasterly and northwesterly direction; thus making the street

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a little short of 8 rods in width. I will not say that the landowners in a rural town may not dedicate their lands to the uses of a public street 8 rods in width, by acquiescence in a public user for travel for the period of 20 years, but I think I may safely say that the presumption is greatly against such a width of road, because it cannot be needed for the purposes of travel. And the proof of the user to the extent claimed should be clear and unequivocal before the presumption is overcome. If we turn to the testimony we shall see the precise character of the use relied upon to establish the public right over that part upon which the defendant is said to have encroached with his fence. David H. Hunting, a witness examined by the defendant, testified that he made the survey of the street and premises. "As I have run the line," he said, "the defendant's fence seemed to be on the highway as it was at the date of the order of the commissioners. It was fully occupied by him up to the line. It was never passable the whole length. It was never used as a highway. The commissioners' line ran into the garden, dwelling house, carpenter's shop and hog-pen of the premises I now occupy, and into six different buildings, and five feet into the church. My house has been there from time immemorial. George Hand owns north of the defendant; the line ran through his door and through his hog-pen and hog-house. The commissioners' line went through the buildings of four individuals, and through the enclosed premises of nine individuals. I am not aware of any attempt to open the road on the south side until within six years." It appears by the map that the premises of this witness adjoin those of the defendant on the west. Sylvanus M. Osborn, who made the survey and was sworn for the plaintiffs, testified that the line of survey cut David Hunting's house, one house on the other side, and Mr. Mulford's barn. These facts show that the commissioners did not intend to run and make a record of the lines of the road as they existed and had existed for the 20 years, but to run new lines and make the street of a width suitable for the pub-

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lic convenience. The defendant's premises have been owned and occupied by himself and his ancestors for 150 years, and there were a number of witnesses examined who had known and remembered them for 60 years and upwards. They proved, beyond dispute, that while there was a door yard fence inside or southerly of the fence complained of as an encroachment; that outside of this door yard fence the *locus in quo* was constantly occupied for domestic uses, such as piling wood, depositing ashes and burying vegetables. This continued, according to the testimony of Mrs. E. Dayton, a daughter of the defendant, down to the year 1850. These uses were inconsistent with the idea of a dedication, and adverse to the claim to use the premises as a public highway. It was not indispensable to the defendant's right to hold the land free from the public easement that it should have been enclosed with a permanent fence. A man may occupy his land without fencing it. He is not bound to fence along the line of the street. The omission to do so, for a great length of time, would doubtless be some evidence of an intention, under the circumstances of the present case, to grant to the public a right of passage over it. But when the land is constantly devoted to domestic uses the want of an enclosure amounts to nothing, because there is a constant, notorious and known assertion of the right of ownership over it.

In conclusion, we think the plaintiffs' action cannot be maintained, and judgment should be entered, upon the verdict, for the defendant.

[DUTCHESS GENERAL TERM, May 11, 1863. *Brown, Scrugham and Lott, Justices.*]

CYRUS CURTISS, special receiver &c., *vs.* JONAS T. BUSH
and others.

The general rule is that there must be an eviction of the mortgagor before he can be relieved from the mortgage on the ground of a failure of the consideration of the mortgage, or of the title conveyed by the mortgagee.

It seems to have been held in all the cases, that there must be an eviction, or something equivalent thereto, to enable a mortgagor to defend against the mortgage, on the ground of a failure of the consideration or the title.

Per JOHNSON, J.

S. conveyed land to B. with a covenant against his own acts, taking back a mortgage for the purchase money. The premises were in fact incumbered at the time, by a judgment against S. under which they were subsequently sold; H. becoming the purchaser at the sheriff's sale, and taking a certificate from the sheriff, which he afterwards assigned to J., who procured a deed from the sheriff and then conveyed the premises to B. J. acted merely as the agent of B., whose possession was not disturbed, and who sustained no damage by reason of the judgment and the sale of the premises thereunder. *Held* that there was neither an eviction of B. the mortgagor, nor its equivalent; there never having been any one who could have rightfully evicted him.

Held, also, that notwithstanding the time for redemption from the sale had expired, the sale had not become absolute, so as, by its own force, to extinguish the title derived by B. from S.; but that the extinguishment was not effected until the sale was completed by the sheriff's deed.

THE plaintiff, as special receiver of the effects of the late North American Trust and Banking Company, commenced this suit in May, 1860, for the purpose of foreclosing a mortgage upon certain lands in the county of Monroe, executed by Bush the appellant, to Abraham M. Schermerhorn, bearing date Feb. 28, 1838, for the sum of \$3044, payable with semi-annual interest on the 1st of December, 1846. At the date of the mortgage, Schermerhorn conveyed the premises to Bush, *with covenant against his own acts*, and not otherwise, and the mortgage was given for the purchase money. Schermerhorn, by an instrument dated the 28th December, 1838, recorded June 17, 1839, assigned the mortgage, together with the bond accompanying the same, to the said North American Trust and Banking Company, and such assignment was duly recorded. At the time of such convey-

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ance and mortgage, the premises were encumbered by a judgment in favor of John Ward and others against Abraham M. Schermerhorn, for \$6883.75, recorded and docketed on the 20th October, 1837. Under this judgment, various parcels of real estate other than the mortgaged premises were sold by the sheriff of Monroe county, in 1840. But there remained a large sum to be collected in order to satisfy the judgment. This fact was ascertained on motion to the court, and an order was made in 1842, directing the sheriff holding the execution to collect the sum of \$1895 and interest out of any other property of the debtor. Nothing further was done on the original execution, but in August, 1847, a new execution was issued with directions to collect \$2611.84, which was returned by the sheriff in November of that year, the indorsement on the writ showing that he had made by the sale of real estate the sum of \$1802.63, and *nulla bona*, &c. as to the residue. At the sale under the execution last mentioned the mortgaged premises in question were "duly sold" to Hamilton Harris, for \$950, and a certificate of the sale was duly filed October 21, 1847. On the 19th of November, 1851, more than four years after the date of the sheriff's certificate, and nearly three years after it had become absolute, Harris assigned it to Henry C. Ives, the consideration expressed being one dollar. Ives procured the sheriff's deed on the 10th of March, 1854, which was recorded June 13, 1854. On the 20th of May, 1854, Ives and wife conveyed the same premises to Bush. The consideration expressed in this conveyance was \$100. Bush had no knowledge of the above mentioned judgment until after the sheriff's sale of the premises and the purchase by Harris. It was found by the referee that Ives, in obtaining the conveyance from Harris, acted as the agent for Bush and not for himself; that nothing was paid by Ives to Harris, and nothing by Bush to Ives for the title under the judgment; but Bush paid Ives for his services. Bush having thus possessed himself of the title under the judgment, proceeded

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afterwards to give two mortgages upon the same premises, one to Bronson for \$2500, and one to Elias Pond for \$2000. These moneys were advanced upon the faith of that title. The holders of these mortgages were made parties defendants, and they severally answered, setting up their rights as first mortgagees, and in opposition to the mortgage sought to be foreclosed. As before stated, the assignment by Schermerhorn to the Trust Company, was dated Dec. 28, 1838. This transaction probably was not consummated until about the time of recording the assignment, which was June 17, 1839. Schermerhorn, it seems, was a large subscriber to the stock of the Trust and Banking Company, and covered his subscription by a mortgage of \$200,000, dated May, 1839. The company having notice of the above mentioned judgment, retained out of the stock of Schermerhorn 86 shares, equal to \$8600, as an indemnity against it. The mortgage in question of Bush to Schermerhorn, was assigned as a mere collateral to the mortgage of \$200,000. Schermerhorn became insolvent and was discharged as a bankrupt in 1843. There are other facts in the case which are stated in the report of the referee, but not material to any question intended to be raised on this appeal. The referee, in deciding the case, sustained the title obtained by Bush under the judgment and sheriff's sale, by adjudging that the mortgages to Bronson and Pond, given upon that title, were valid liens, prior and superior to the mortgage from Bush to Schermerhorn, to foreclose which the suit was brought. Nevertheless, as to the defendant Bush, the referee took no notice of such title, but directed judgment for the foreclosure of the mortgage to Schermerhorn, for the sum of \$4246.19 and costs of suit, subject, however, to the mortgages of Bronson and Pond. The referee, in his opinion, held the sheriff's sale and conveyance under the judgment to be unquestionably legal and valid, and on that ground he sustained the two derivative mortgages to Bronson and Pond; and he held fur-

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ther that notice to these mortgagees of all the facts, would make no difference.

The defendants appealed from the judgment entered upon the report of the referee.

George F. Comstock, for the appellants.

T. Westervelt, for the respondent.

By the Court, JOHNSON, J. I am of the opinion that the referee was right in holding that the plaintiff's mortgage was not discharged, but was still a subsisting lien and incumbrance upon the premises, as against the defendant. The general rule is that there must be an eviction of the mortgagor before he can be relieved from the mortgage on the ground of a failure of the consideration of the mortgage, or of the title conveyed by the mortgagee. (*Bumpus v. Platner* 1 *John. Ch.* 213. *Abbott v. Allen*, 2 *id.* 519. *Banks v. Walker*, 2 *Sand. Ch.* 344.)

But it has been repeatedly held that when the title under which the mortgagor held has been extinguished, so that he may be legally evicted, he may then either attorn to the holder of the paramount title or surrender possession to him on demand, and defend against his mortgage without actual eviction. (*Simers v. Saltus*, 3 *Denio*, 214. *St. John v. Palmer*, 5 *Hill*, 599. *Leach v. Bailey*, decided in court of appeals in 1857; opinion by Brown, J. not reported.) There are several cases on this subject; but I do not find one in which it has been held that there need not be an eviction, or something equivalent thereto, to enable the mortgagor to defend against the mortgage. In *Leach v. Bailey*, which seems to be very much relied upon by the defendant's counsel, the prior mortgage had been foreclosed in equity, and a deed given to Minott the purchaser. Bailey had then attorned to Minott, and afterwards purchased and took a deed from him. The court held that Minott being entitled

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to the possession under his deed, and also under the decree of foreclosure, the eviction was complete by the attornment, or yielding possession to the purchaser.

But here, as the referee held, there has never been any one who could have rightfully evicted the defendant. Harris, the purchaser at the sheriff's sale, although he took his certificate, never obtained his deed, and until he obtained his deed, the title remained in the defendant, as it was before the sale. The assignment of the certificate to the defendant's agent, Ives, was an assignment, in effect, to the defendant himself, and the subsequent conveyance by the sheriff was of the same character. Ives could not dispossess the defendant, nor could there be any valid attornment to him. So that here was neither an eviction nor its equivalent.

It is strenuously urged by the defendant's counsel that the time for redemption from the sale having expired, the sale had become absolute, and by its own force had extinguished the title derived by the defendant from Schermerhorn. But I think the extinguishment was not effected until the sale was completed by the conveyance. Before the assignment of the sheriff's certificate the legal title might have been withdrawn from the defendant at any moment; but it was not. In short it never was withdrawn. Both titles met in the same person, and, legally speaking, there could be no extinguishment; at least, none in hostility to the defendant's just title. If it was extinguished it was done by the defendant himself, and I know of no rule by which he would be entitled to defend on that ground. If Harris had taken a sheriff's deed, as the case now stands in other respects, his right would, as it seems to me, be entirely clear. But as he did not, but only assigned to the defendant the right to demand and take one, the case falls short of any adjudged case I have been able to find, in which relief has been granted. In order to give the defendant relief, as the case now stands, all idea of eviction, as in any way essential, must be extracted from the rule.

The defendant was under no obligation, by promise, or any

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legal duty, to pay off the judgment for the protection of his title, or of the mortgage in question. That duty rested upon the plaintiff, or those under whom he claims. And had the defendant paid any thing in the purchase of the certificate, such amount should have been deducted from the amount due on the mortgage. But as he paid nothing, there was nothing to be allowed. I do not think it in any way essential whether he had paid any thing or not, had the title vested in Harris before the purchase, because in that case there would have been a complete extinguishment of his title by the act or proceeding of another, which seems to me quite material, as the rule now stands. If the rule is to be modified, it is better that it should be done by the court of last resort.

The judgment must therefore be affirmed.

[MONROE GENERAL TERM, June 2, 1863. *E. Darwin Smith, Welles and Johnson*, Justices.]

INDEX.

A

ACCESSORY TRANSIT COMPANY.

1. Although the Rivas-Walker government, in Nicaragua, was not recognized by the United States in February, 1856, when that government made a decree annulling and revoking the charter of the Accessory Transit Company, yet such decree still remaining in force and being enforced by the government of Nicaragua, in May, 1856, when that government was recognized by the United States; *Held* that from the latter period, at least, if not from the time of its date, the decree must be considered as a valid act of the government of Nicaragua.
Murray v. Vanderbilt, 140

2. *Held, also,* that if the decree was not void at the time of its passage, the recognition of the government by the United States in May, 1856, would have a retro-active effect, so as to give validity in this country to the decree previously made, so far as to enable the courts here to act on it as affecting the charter. *ib*

3. Considering that decree as valid, its effect was not such as absolutely to dissolve the company, and make a service of process on its officers void; but it left the corporation still in existence, for certain purposes. *ib*

4. And the corporation being still in existence, a receiver could derive title to its property, under proceed-

ings instituted against the corporation by creditors. *ib*

See AGREEMENT, 1.

ACTION.

1. S. being the owner of premises covered by a mortgage given by a former owner, W. applied to him for \$85, and on obtaining that sum, executed the following instrument: "Received, Deposit October 8, 1859, from S. at the hand of E. eighty-five dollars which I promise and agree shall be indorsed on bond and mortgage known as the John Peters mortgage, which I have an interest in." W. was not the holder or owner of the Peters mortgage, at the time; having at most, only some equitable or beneficial interest therein. The money was never indorsed on the Peters mortgage, nor repaid to S. The bond and mortgage came into the hands of a bona fide holder, who paid for it the full amount appearing due, and without deducting the \$85. A junior mortgage was subsequently foreclosed, and the property was sold, subject to the Peters mortgage, and without any deduction or credit of the \$85. *Held* that an action would lie, by the executors of S., against W. to recover damages for a breach of the agreement contained in the receipt.
Evans v. Wilcox, 135

2. In the absence of an express agreement to that effect, there is no liability on the part of contractors upon public works to pay to subcontractors the 20 per cent reserved

in the original contract, for the payment of laborers or mechanics who may be employed. *Wells v. Williams*, 567

8. And a provision made by a contractor, in a contract between him and a sub-contractor, that he shall be entitled to retain in his hands a part of the earnings, as a protection against his liability to the persons employed by the sub-contractor, will not give to the latter, or his assignee, any right of action against the contractor personally, nor any lien on the fund itself. *ib*

See AGREEMENT, 7.

ATTACHMENT, 1, 2, 4.

BANKS, 1, 2.

EQUITY, 1.

EXECUTORS AND ADMINISTRATORS.

LIMITATIONS, STATUTE OF, 7.

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RIPARIAN OWNERS, 2.

VENDOR AND PURCHASER, 1, 6.

ADJOINING PROPRIETORS.

See EJECTMENT.

ADMISSIONS.

See EVIDENCE, 1, 2.

ADVERSE POSSESSION.

1. A lease, under which the defendants had held certain premises, expired on the 1st of February, 1852; the defendants had six months thereafter, to remove buildings, &c. On the 28d of July, 1852, a deed of the premises was executed to the plaintiffs, the defendants being at the time still in the possession; but they had made no open or notorious claim of adverse possession. *Held*, that they were to be deemed tenants holding over, or persons claiming possession under the former title, and not as holding under an adverse title. *Corning v. Troy Iron and Nail Factory*, 311
2. Under the statute against champerty, which makes every grant of lands absolutely void if at the time of the delivery thereof such lands shall be in the actual possession of a person claiming under a title adverse

to that of the grantor, the possession must not only be adverse, but it must be under some specific title which, if valid, would sustain the claim. A general assertion of ownership, without reference to a particular title; or relying upon a title which would not entitle the party to the possession; is insufficient. *Fish v. Fish*, 513

8. Distinction between the statute regulating and defining *adverse possessions* and prescribing their effect in quieting titles and limiting actions, and that against *champerty*, and the cases arising under them. *ib*
4. The objects of the two acts were different. The one was to quiet titles and terminate disputes, and the other was to prevent the transfer of disputed titles; and hence the difference in their phraseology. *ib*
5. To avoid a deed given by one out of possession, the party in possession must hold adversely "claiming under a title," and not "under claim of title." *ib*
6. A title which the defendant has conveyed to the plaintiff's grantor cannot be a title in him under which he can set up an adverse possession to avoid a deed by his own grantee. *ib*
7. A certificate given to the purchaser at a tax sale, by a municipal corporation, entitling him to a deed at the expiration of a year, unless the premises shall be redeemed, but not giving him the possession or the right of possession, and not professing to transfer the title, does not constitute a title under which the holder can claim an adverse possession. *ib*

AGREEMENT.

1. An agreement was made between the Pacific Mail Steamship Company and the Accessory Transit Company, by which the former company was to pay to the latter a certain sum per trip, or per month, so long as the boats of the Pacific Company should run without opposition. *Held* that in an action brought by the Transit Company against the

Pacific company, although the contract was immoral and in restraint of trade and commerce, the court would not enforce it against the delinquent party, or, if the money had been paid, enable the party paying to recover it back, but would leave the parties as the law found them; both being in *pari delicto*. Yet that the rule did not apply to an action by one of the principals in such a contract, against its agent who had received money thereon. *Murray v. Vanderbilt*, 140

2. C. applied to the plaintiff to be supplied with gas light and meter on the premises occupied as the Gramercy Park House, and agreed to pay for the same, on the usual terms; E. signing the application as surety. Subsequently C. ceased to be the occupant of the premises, and W. became his successor. *Held* that E. by signing the application undertook to pay for gas and meter supplied to C. at the Gramercy Park House, if C. did not pay; but that he was not liable for gas furnished to W. after he became the landlord. *Manhattan Gas Light Company v. Ely*, 174

3. *Held also*, that E. could not be made liable to pay for gas furnished to W., on account of C.'s neglect to give notice to the plaintiff of the change of proprietorship of the hotel. *ib*

4. The plaintiffs, having erected a suspension bridge across the Niagara river, leased the rail road floor thereof, excepting the side-walks and gates, to the Great Western Railway Company, during the continuance of its charter, at an annual rent. The railway company was to have the right to extend to other companies and persons the privilege of crossing the rail road bridge, with locomotives, trains and cars, carrying passengers and freight, &c. subject to certain conditions. It agreed not to afford the means to other persons, except rail road passengers, of crossing, and evading the payment of tolls, and was to be responsible that the companies, &c. to whom it should underlet should keep within the restrictions. Regular rail road passengers, coming from or going to a point five miles distant, were, on producing tickets

from the rail road company, showing them to be such passengers, to be permitted to pass free of toll. The railway company agreed to adopt reasonable regulations necessary to prevent evasions of the rights of the plaintiffs to have tolls from all except legitimate railway passengers. It also agreed to allow from its own company, and to procure from the rail road companies with which it should arrange for the use of the bridge, free tickets for the directors and officers of the bridge companies, over their respective railways. An agreement was subsequently made between the Great Western Railway Company and the N. Y. Central Rail Road Company, touching the use of the bridge by the latter company, for the interchange of passengers and freight. The plaintiffs, in their complaint, alleged continued breaches of the contract by the railway company, in the use of its cars in carrying passengers across the bridge, and also in not procuring free tickets or passes for the plaintiff's directors, &c. over the road of the N. Y. Central Rail Road Company. The complaint alleged that the plaintiffs had sustained large damages, and, as a part of their relief, prayed for a perpetual injunction. The referees found, as facts, that the Great Western Railway Company had refused to furnish or procure for the plaintiffs' directors free passes over the N. Y. Central Road, who had thereby been compelled to pay \$486.61 for fares; that the company had permitted persons who were not rail road passengers entitled to pass free, to cross the bridge on its cars without payment of tolls to the plaintiffs, and had collected tolls of persons so crossing; and that the company, though often requested, had never adopted or enforced reasonable regulations necessary to prevent evasions of the plaintiffs' rights to toll for crossing their bridge, by persons not entitled to cross free. *Held*, that the defendant was bound to perform its agreement, by adopting and carrying into effect the reasonable regulations necessary to prevent evasions of the plaintiffs' rights; that the plaintiffs were entitled to recover the sums paid for the fares of their directors over the N. Y. Cen-

tral Road, and the amount of tolls found to have been collected by the defendant from passengers not entitled to pass free; and that they were entitled to an injunction. *Niagara Falls International Bridge Co. v. Great Western Railway Co.* 212

5. *Held, also*, that such injunction could be sustained upon the ground that an action at law, for damages, would afford no adequate redress, and the injury to the plaintiffs would be irreparable. *ib*

6. *Held, further*, that by using the bridge in a manner prohibited by the agreement, and permitting persons to cross it free, the defendant was guilty of a continual nuisance, within the authority of the case of *Thompson v. The N. Y. and Harlem Rail Road Company*, (8 *Sand. Ch. Rep.* 625,) which might be restrained by injunction. *ib*

7. The defendant, being the owner of a judgment against H., rendered by a justice of the peace, upon which an execution had been issued and levied on sufficient property, sold the same to the plaintiffs, who gave their promissory notes for the amount, which were received in full satisfaction for the judgment; the defendant agreeing to assign the judgment to the plaintiffs the next morning. Instead of doing so, however, he receipted the execution in full, and the justice thereupon discharged the judgment. H. then gave a chattel mortgage upon the property levied on, to other persons. The defendant kept the notes, and refused to assign the judgment. *Held*, that the evidence showed a good cause of action in favor of the plaintiff, for the breach of the defendant's agreement, and that it should have been submitted to the jury. *Smith v. Brownell*, 370

8. The law sometimes supplies by its implications, the want of express agreements between parties, but never overcomes by implications the express provisions of parties. If they are illegal, the law avoids them. *Calkins v. Falk*, 620

9. So if the meaning of the instrument is uncertain, the intention may be ascertained by extrinsic tes-

timony; but it must be a meaning which may be distinctly derived from a fair and rational interpretation of the words actually used. If it be incompatible with such interpretation, the instrument will be void for uncertainty and incurable inaccuracy. *ib*

See FRAUDS, STATUTE OF.
INSURANCE, 1,
PROMISSORY NOTES, 4.

AMENDMENT.

1. An amendment which will change the form and nature of the action from tort to assumpsit cannot be asked for after the whole case is finished. *Ransom v. Wetmore*, 104
2. A defendant is not obliged, in that stage of the case, to assent to so important and material a change, or by failing to do so, to waive his rights already acquired by a motion for a nonsuit. His refusal to assent to such an amendment cannot be regarded as in any way affecting the question presented on the motion for a nonsuit. *ib*

APPEAL.

Where no exception is taken by the successful party to a finding of the court below upon a question of fact, nor any attempt made to review it in any mode known to the law, for the purposes of the hearing upon appeal the finding must be taken as true, and the party will be precluded from insisting upon the contrary. *Fake v. Whipple*, 339

See COUNTY COURT.
SHERIFF, 3.

ARREST.

1. Although the commissioners of the metropolitan police may have power, by rules and regulations adopted in pursuance of section 27 of the act of April 10, 1860, amending the metropolitan police act, to provide that certain officers in their employ shall "be deemed always on duty," yet no such regulation can alter the meaning of the 34th section of the

same act, which declares that no person holding office under that act shall be liable to arrest on civil process, or to service of subpoenas from civil courts, "*whilst actually on duty.*" *Hart v. Kennedy*, 186

2. Though they may be *deemed* to be on duty, yet if they are not *actually* on duty, the officers are liable to arrest, and to be served with subpoenas. *ib*

3. The 34th section of the act of 1860, by declaring that no officer shall be liable to arrest &c. whilst actually on duty, plainly implies that they shall be liable to arrest whilst *not* actually on duty; and that no officer shall be deemed to be actually on duty at all times and under all circumstances, so as never to be liable to arrest. *ib*

ASSAULT AND BATTERY.

In an action for assault and battery, the judge charged the jury as to the effect of their verdict on the question of costs, in case they should find for the plaintiff, and refused to charge them that in arriving at the amount of the verdict they would give the plaintiff, they had nothing to do with the question of costs, or whether or not their verdict would entitle him to full costs. *Held* correct. *Waffle v. Dillenbeck*, 123

ASSESSMENT.

See MUNICIPAL CORPORATIONS, 1 to 6.

ASSIGNMENT.

See DEBTOR AND CREDITOR, 2, 3, 4.

ATTACHMENT.

1. At common law, when personal tangible property of a debtor has been levied upon, by virtue of an execution or attachment, it is in the custody of the law, whose minister, the sheriff, is the proper person to bring actions to recover the possession or value thereof. The plaintiff cannot sue therefor. *Skinner v. Stuart*, 206

2. Section 232 of the code does not authorize the *plaintiff* in an attachment suit to commence an action to take possession of the tangible property levied on, or to take legal proceedings to collect or receive into his possession debts, credits and effects of the defendant. *ib*

3. The only provision in the code, or in any other statute, which authorizes any proceeding directly by the plaintiff, is contained in section 238 of the code. *ib*

4. And a plaintiff in an attachment suit cannot commence an action under that section, without first executing to the sheriff the *undertaking* therein mentioned. *ib*

5. The remedies afforded to plaintiffs by the chapter of the code relating to attachments are not merely cumulative. They are the only remedies known to the law in such cases. *ib*

6. A complaint, in an action by attaching creditors, alleging that the defendants have a large amount of personal property, consisting of money, bills, notes and other evidences of debt, &c. deposited with them by, and belonging to, the defendants in the attachment suit, without showing any fraud, collusion or combination obstructing the ordinary processes of the law, or alleging that those processes have been exhausted, or even resorted to, or that the lien cannot be enforced without the intervention of the court in the exercise of its equitable powers, does not state a sufficient cause of action to sustain a suit demanding the intervention of the court by the exercise of its equitable or extraordinary powers. *ib*

7. The only remedy, in such a case, is under section 238 of the code; its conditions being first complied with. *ib*

B

BANKS.

1. The claim for dividends improperly declared by an insolvent banking corporation belongs to creditors.

and not to the receiver. The right of action is in them, and the receiver cannot collect such moneys for the benefit of stockholders. *Butterworth v. O'Brien*, 192

2. Nor is it a cause of action that such dividends were paid to persons who were indebted to the bank. *ib*

3. Where, in an action by the receiver against the former president of a bank, the complaint alleged that the defendant used fictitious notes in lieu of money of the bank, which he fraudulently used and disposed of, and that such notes were among the assets of the bank; *Held* that these facts, if proven, would be sufficient to put the defendant on his defense; and that the claim was one which belonged to the receiver, and might be collected by him. *ib*

4. Where, after the making of an assessment against the stockholders of a bank, in pursuance of the act of April 5, 1849, to enforce the responsibility of stockholders &c. for the unsatisfied debts of the bank, there remains a sum in the hands of the receiver, the proceeds of certain assets of the bank, beyond what was anticipated or known at the time of the assessment, the same will not be ordered to be distributed among the stockholders, so long as there are creditors of the bank who are not yet fully paid, and such assets are necessary for that purpose. *Matter of Pruyn v. Van Allen*, 354

5. It was not the intention of the act, or of the constitution, that stockholders should be reimbursed any portion of their contributions, until the debts of the corporation were extinguished; but on the contrary it was designed to make the stockholders liable to the creditors, to the full extent of their stock, until the debts are completely satisfied. *ib*

See PRINCIPAL AND AGENT, 3, 4, 5.

BRIDGE.

See AGREEMENT, 4, 6.
MUNICIPAL CORPORATIONS, 4.

BROOKLYN, (CITY OF.)

See JAIL LIMITS.

C

CARRIERS.

A rail road company, whose constant employment and business was the transportation of property and passengers upon its rail road, for hire, agreed with the plaintiff to furnish the motive power to draw his cars, laden with his property, over its rail road; the plaintiff being bound to load and unload the cars, and to furnish brakemen to accompany them on the road, who were to be under the control of the defendant's conductor. *Held* that the defendant assumed the liabilities of a common carrier, and was liable as such for an injury to the cars of the plaintiff and his property therein, not caused by inevitable accident or the public enemies. *Mallory v. Tioga Rail Road Company*, 488

CAVEAT EMPTOR.

See WARRANTY, 1.

CHAMPERTY.

See ADVERSE POSSESSION, 2, 3.

CHARGE OF JUDGE.

See ASSAULT AND BATTERY.

CHATTEL MORTGAGE.

1. When a mortgagor of chattels is in default in not paying the mortgage debt, the mortgagee has a right to take the property into his possession and dispose of it at his pleasure. *Talman v. Smith*, 390
2. If, after forfeiture, the mortgagee sells the property to a third person, with the consent of the mortgagor, this will be equivalent to a formal foreclosure of the equity of redemption. *ib*

3. And the title of the purchaser cannot be assailed by creditors of the mortgagor having no lien upon the mortgaged property at the time of his purchase. *ib*
4. One purchasing the property from the mortgagee, and taking possession after forfeiture of the condition of the mortgage, at a time when there was no creditor in a situation to object to the sale, and continuing in possession, is to be deemed, *prima facie*, the absolute owner, and is not bound to go further, in the first instance, and account for the possession of the mortgagor during the existence of the mortgage. *ib*
5. No presumption of fraud in the purchase exists by reason of the previous possession of the mortgagor; and a creditor of the mortgagor, asserting such fraud, holds the affirmative, and is bound to establish it by proof. *ib*
6. The want of possession in the mortgagee is not sufficient evidence, of itself, to authorize the presumption of fraud. *ib*
7. After the debt secured by a chattel mortgage has become due, and a forfeiture has occurred by reason of non-payment, the title of the mortgagee is absolute, and the mortgagor has no interest in the mortgaged property which is liable to be sold on execution against him. *Champlin v. Johnson*, 606
8. And this notwithstanding the property has been suffered to remain in the possession of the mortgagor, after forfeiture. *ib*
2. A check was drawn by W. payable to the order of the plaintiff, and indorsed by the defendant. It was negotiated to the plaintiff, by W., in payment for property sold. The plaintiff afterwards indorsed the check, and passed it, and the same being protested, for non-payment, he retired it, at maturity. The defendant did not indorse the check to give the maker credit with the plaintiff, and did not intend or agree to become liable to the plaintiff upon the check, or otherwise than as second indorser. *Held* that the plaintiff could not maintain an action against the defendant, upon the check. *Lester v. Paine*, 616
4. Under such circumstances, the legal intentment is that the indorser only intended to become liable as a second indorser, and *subsequent* to the payee. And that he indorsed the paper with the understanding that the payee was to be the *first indorser*. *ib*
5. Aside from the paper itself, there must be extrinsic evidence that the indorsement was given with the intent of the indorser to give the maker credit with the payee, so that the payee would have a right to indorse his name, without recourse. *ib*
6. Knowledge by the indorser that his indorsement is to be used by the maker of the check to obtain credit with the payee is not to be inferred from the fact that the indorser signed before the payee. *ib*

See PRINCIPAL AND AGENT, 3, 4, 5.

CODE.

See WITNESS, 2.

COMPLAINT.

See ATTACHMENT, 6.

CONSTITUTIONAL LAW.

1. A creditor who has received from his debtor a check upon a bank, cannot return the same to the drawer, and sue on the original cause of action, without having first demanded payment. *CLERKE, J. dissented. Bradford v. Fox*, 203
2. Presenting a check to the bank, to be certified, is not equivalent to a demand of payment; and the refusal of the bank to certify it will not excuse the holder from presenting it for payment. *ib*
1. The act of the legislature, of April 21, 1862, "to facilitate the closing up of insolvent and dissolved mutual insurance companies," is not unconstitutional and void, as impairing the right of trial by jury. *Sands v. Kimbark*, 108

2. The act of congress, passed February 25, 1862, authorizing the issue of treasury notes, to the amount of \$150,000,000, and declaring that such notes "shall be lawful money and a legal tender in payment of all debts, public and private," &c., is a constitutional and valid law. *Hague v. Powers*, 427
3. Congress has the power to authorize the issue of treasury notes, to circulate as money. And it can make such notes a legal tender. *ib*

CORPORATION.

1. An appearance of a corporation, by officers of the court, will be valid and give jurisdiction, whether the service of process upon its officers be good, or not; provided the corporation is still in existence. *Murray v. Vanderbilt*, 140
2. Where the president and secretary of a corporation executed an assignment of its property, and attached the seal of the company thereto, without any specific authority from the company to do so; *Held* that it was not a proper execution of the instrument; and that the want of authority on the part of the officers could not be cured by any proof of execution made before the commissioner. *ib*
3. After a corporation has virtually ceased to exist, and for all purposes of business, and for promoting the objects of the charter, all its powers have been taken away, its property all expended, and the company is hopelessly insolvent, it is not improper for the president of the company to enter into arrangements on his own behalf, for carrying on and continuing for his own benefit the business formerly conducted by the company, under an agreement not imposing any duty or obligation upon the corporation, or involving any use of its property. *ib*
4. The being president of an insolvent corporation will not prevent one from doing what the corporation has lost all ability to do. After the company has virtually ceased to exist, and its powers have been taken away, the reason and policy of the

rule prohibiting a trustee from making agreements for his own benefit, ceases also. *ib*

5. Where the president of a corporation, holding a mortgage upon vessels of the corporation, given to secure him for advances made, and for bonds of the company held by him, and authorized by the company to sell the vessels as its agent, sold the same, at private sale, to his son, taking his note for the purchase money, payable in a year, he still keeping the control and management of the vessels and rendering no account to the purchaser for the use of them; *Held* that such a transaction could not be upheld; and the sale was ordered to be set aside, and the agent directed to account to the company for the proceeds of the vessels, when subsequently sold by him. *ib*

See ACCESSORY TRANSIT COMPANY.
FOREIGN CORPORATIONS.

COSTS.

The want of jurisdiction of the court over the subject matter of the action will not prevent the defendant from recovering costs on the dismissal of the complaint. *Cumberland Coal and Iron Company v. Hoffman Steam Coal Company*, 16

See ASSAULT AND BATTERY.
SURROGATE.

COUNSEL FEES.

See SURROGATE.

COUNTER-CLAIM.

See SET-OFF.

COUNTY COURT.

Where two or three independent causes of action are prosecuted, in a justice's court, and the judgment is right as to one and erroneous as to the others, which fact distinctly and plainly appears on appeal, it is the right and duty of the county court to reverse as to the erroneous

and affirm as to the legal part of the judgment. *Staats v. Hudson River Rail Road Co.*, 298

CRIMINAL LAW.

See RECOGNIZANCE.
WARRANT OF ARREST.

D

DAMAGES.

See FALSE IMPRISONMENT, 2, 3.
INJUNCTION.
SET-OFF.
SHERIFF, 2.
VENDOR AND PURCHASER, 1, 3, 4.

DAMS.

1. Where the owner of a mill-site has, by his dam, raised a certain head of water, and maintained such dam long enough to raise the presumption of a grant, he may repair his dam, for the purpose of making it tighter and more enduring, although the effect may be to keep the water more constantly at an upper level. *Hynds v. Shults*, 600
2. Making the structure more firm and tight, so as to enable the owner to enjoy the full benefit of his privilege, will not create a liability for damages, to the owners of adjacent land; so long as the height of the dam, as repaired, is not greater than it was before. *ib*
3. If the mill-owner does not, by his repairs, raise the water higher than it was before, so as to overflow lands not previously covered, no action will lie against him for damages. *ib*

DEBTOR AND CREDITOR.

1. Generally.

1. Where B., with the intent to hinder and delay his own creditors, falsely and fraudulently held out to the public and pretended that personal property bought and paid for by him, and then in his possession, belonged to M., the lease of

the store being in the name of M. and his name upon the awning; Held that after a creditor of M. had levied upon the property as M.'s B. could not be permitted to allege that the property belonged to him, instead of M. *Rigney v. Kirley*, 383

2. Assignments for the benefit of creditors.

2. Section two of the act of 1860, respecting assignments for the benefit of creditors, requiring an assignor, within twenty days after the date of an assignment, to make and deliver to the county judge an inventory of his debts and assets, and section three, requiring the assignee, within thirty days after the date of the assignment, to give a bond conditioned for the faithful discharge of his duties, are *directory* merely; and an omission to execute and deliver the assignment, and to file the bond, within the times specified, will not render the assignment inoperative and void. *Juliand v. Rathbone*, 97

3. If an assignment is valid when made, and vests the title in the assignee, neither the omission of the assignor to deliver an inventory, nor any omission of duty by the assignee in the execution of the trust, will reach back and render the assignment invalid. *ib*

4. An assignment for the benefit of creditors reserving nothing to the assignors and containing no provisions that the law holds sufficient to vitiate it, is not to be adjudged fraudulent and void because of a clause preferring certain creditors who had previously signed a composition deed agreeing to take fifty cents on the dollar and release the assignors; where it is found that the composition deed and the assignment were separate and distinct transactions, and were not part of one original plan or agreement, or to be construed with reference to each other. *Renard v. Graydon*, 543

DECLARATIONS.

1. Before evidence of the acts and declarations of persons not parties to an action can be properly re-

ceived in evidence, on the ground of there having been a common intent or purpose to hinder, delay or defraud creditors, the common unlawful design should be clearly proved, as a condition precedent. Evidence which is merely admissible on the question of the common illegal purpose, is not sufficient.

Jones v. Hurlburt, 403

2. If the evidence given with a view to establish the fact either that there was an unlawful compact for the purpose mentioned, or the connection of a party to the suit with it, is merely competent upon the question, but insufficient to establish the fact, evidence of the acts and declarations of the parties to the compact is inadmissible. *ib*

3. It is the province of the judge, and not of the jury, to pass upon the question whether there was a common intent or purpose to defraud, among the parties whose declarations are sought to be proved. *ib*

See EVIDENCE, 2.

DECREE.

See ACCESSORY TRANSIT COMPANY.

DEED.

1. Where a deed was conditioned for the support and maintenance of S. and his wife, the grantors; *Held*, in an action, by the heirs of the grantors, to recover the premises for a breach of the condition, that it was not erroneous to charge the jury that if S. had expressed himself satisfied with the manner in which he was treated by the grantee, it was to that extent a waiver of a strict performance. And that the charge must be deemed confined to the time when the admissions were made, and not as embracing a subsequent period. *Spaulding v. Hallenbeck,* 79

2. Where a deed was upon the express condition that the grantee should keep, maintain and support the grantors, and that if he failed to do so, the conveyance should be void and the premises revert back to the grantors; *Held* that the condition involved a forfeiture of the

premises, upon a failure of the grantee to perform, and was intended as a security in the nature of a penalty for its performance. That it was a condition subsequent, and upon failure to fulfill, the grantors had a right to re-enter upon the premises. *ib*

3. In such a case it is proper for the judge to leave it to the jury to determine whether the grantee intended, in good faith to perform, and had substantially performed, the condition of the deed; and that a substantial compliance with the contract would save the forfeiture. *ib*

DEMAND.

See LIMITATIONS, STATUTE OF, 1, 7.

DEVISEES.

Where a tenant for life of real and personal estate sells a part of the personal property, receives the money therefor; and loans the same, devisees in remainder cannot sue for the money, after the death of the tenant for life; there being no privity between them and the borrower. *Dickey v. Lawrence,* 886

DOWER.

1. The provision of the revised statutes requiring notice of proceedings for the admeasurement of dower to be given to the owners of the land claiming a freehold estate therein, is not complied with by merely giving notice to the tenant or person in possession. *Stewart v. Smith,* 167
2. With the consent of a doweress, rooms in a building can be assigned for dower, but it seems not without her consent. *ib*

E

EJECTMENT.

1. A *cestui que trust*, after having assented to a sale made by the trus-

tee, by accepting his share of the proceeds, cannot maintain ejectment to recover possession of his share of the land, on the ground that the sale was void. *Johnson v. Bennett*, 237

2. Where one erects a building upon the line of his own premises, so that the eaves or gutters project over the land of his neighbor, this is not such an encroachment upon the possession of the latter as will sustain an action of ejectment. An action for a nuisance is the appropriate remedy in such a case. *Aikin v. Benedict*, 400

3. Although it is sufficient, *prima facie*, for the plaintiff, in ejectment, to show a right of possession in himself, under a foreclosure sale, yet if the defendant can show an equitable right to the possession in a third person, under whom he claims, this evidence will be legitimate and proper, and will constitute a complete equitable defense to the action. *Safford v. Hynds*, 625

EQUITABLE ASSIGNMENT.

Where a draft is drawn upon a fund in the hands of a third person and accepted by the drawee, this operates as a valid equitable assignment of the fund to the holder, and entitles him to hold it, as against all other persons not having a prior or a better equity. *Wells v. Williams*, 567

EQUITABLE CONVERSION.

1. Where a testator directed his executors to sell certain land, convert it into money, and invest it until the youngest child should become 18 years of age, and then distribute the same among his children; *Held* that this presented a case of *equitable conversion*, and the estate became impressed with the character of personal property, and was to be distributed as such. *Johnson v. Bennett*, 237

2. And the land having been sold by the executors, and the share of one of the married daughters of the testator in the proceeds, paid over to her husband, who gave his receipt

therefor; *Held* that the husband thereby extinguished all claim which he had upon the proceeds, as such husband, as well as all claim which his wife had upon the lands sold. 16

See WILL, 2.

EQUITY.

1. Notwithstanding the right to sue at law for damages, a suit in equity may be maintained, for an injunction to restrain the defendants from diverting a water course from its natural bed or channel through or along the plaintiffs' lands, and from drawing and using the water by means of such diversion, and by decree compelling the defendants to restore the waters to their natural bed or channel. *Corning v. Troy Iron and Nail Factory*, 311
2. Special damages need not be averred, in order to entitle a party to an injunction, in such a case. 16
3. The interference of a court of equity, in cases of this description, may be justified on the grounds that it makes the relief final and comprehensive, avoids a multiplicity of suits, and is equally effective with an action at law in preventing the adverse possession of the defendants from ripening into a hostile and perfect title. 16

See PENALTIES AND FORFEITURES.
TRUSTS AND TRUSTEES, 3.

ESTOPPEL.

1. An estoppel can never arise, founded upon an omission to object to an act or a declaration, when such act is perfectly justifiable, or such declaration perfectly true. *Corning v. Troy Iron and Nail Factory*, 311
2. It is because a party stands silently by and sees an injurious and unwarrantable act done to his property, or hears a false and injurious declaration made, affecting his rights, and does not protest against it, that he is regarded as tacitly acquiescing in the propriety of such an act, or the truth of such declara-

tion, and shall not be permitted thereafter to question it when such a course would work damage to an innocent party. *ib*

See WATER, 5, 6.

EVICITION.

See MORTGAGE, 3, 4, 5.

EVIDENCE.

1. The admissions of a grantor in a deed, against his own interest, and tending to establish a sufficient consideration for the deed, he being an original party to the record and identified in interest with the plaintiffs, are admissible in evidence against the plaintiffs, as part of the *res gestæ*. *Spaulding v. Hallenbeck*, 79
2. In an action by the heirs of a grantor, against the grantee, to recover possession of the land, for a breach of the condition upon which it was conveyed, the declarations of the grantor, showing a performance of the condition, are admissible. *ib*
3. A plaintiff having proved the existence of a written dissolution of a partnership, in 1854, called M. as a witness, to produce that paper. M. denied having it, and denied its existence. He then, on cross-examination, swore that the firm was dissolved in 1844 or 1845. Held that this was an affirmative and independent fact, and could not be upheld as a cross-examination, there being nothing to cross-examine about. *Union Bank v. Mott*, 180
4. Medical testimony, as to the personal injuries likely to be produced under a given state of facts, is admissible, where the witness states the precise facts on which he bases his opinion, and the court does not withdraw from the jury the right or liberty to consider whether those facts were established by the testimony. *Wendell v. Mayor &c. of Troy*, 329

See AGREEMENT, 9.

DECLARATIONS.

FALSE IMPRISONMENT, 6.

VENDOR AND PURCHASER, 2, 3.

EXECUTORS AND ADMINISTRATORS.

1. An action will not lie by the executor and one of the two executrices of a testator, against the other executrix and her husband, to recover damages against the husband for the alleged wrongful conversion by him of certain chattels and choses in action of the testator, in his lifetime. *Whitney v. Coapman*, 482
2. A legatee *as such* has no right of action in such a case. He does not represent the testator; and whatever right he may have, in respect to the estate, can only be enforced in a proceeding against the executors. *ib*
3. A claim for the wrongful conversion of property of a testator, in his lifetime, belongs primarily to the executors, and can only be enforced by action by them. *ib*

See MORTGAGE, 2.

F

FALSE IMPRISONMENT.

1. Where a justice issues a warrant of arrest on a criminal charge, without sufficient evidence of the commission of the offense by the accused, the justice and the complainant are jointly liable, in an action for false imprisonment. *Comfort v. Fulton*, 56
2. In an action for false imprisonment the jury has a right to give damages beyond a mere compensation to the plaintiff for his injuries, and inflict a punishment upon the defendant for his conduct; but not to an arbitrary amount. *Brown v. Chadsey*, 253
3. Where the plaintiff was arrested by a police officer, early in the morning, at the request of the defendant, or upon facts or circumstances of suspicion communicated by him, and was taken to the police office in Centre street, New York, where he remained some time, no one appearing to make a complaint against him; and he was then required to appear at a subsequent hour, 10 o'clock, at which time, no one appearing against him, he was dis-

charged, on his promise to appear again if required; the plaintiff having recovered a verdict for \$2000 for this arrest and false imprisonment; *Held* that the damages were excessive, and a new trial was granted. *ib*

4. If a private person takes any part in an unlawful imprisonment of another, by an officer, he becomes a principal in the act, and is liable for the trespass. But if he merely communicates facts or circumstances of suspicion to the officer, leaving him to act on his own judgment and responsibility, he is not liable at all in an action either for malicious prosecution or for false imprisonment. *ib*

5. Under the code, in an action for false imprisonment, a justification on the ground that the defendant had reason to suspect that a criminal offense had been committed by the plaintiff, must be pleaded specially; and the answer must first show the actual commission of an offense, and then the cause to suspect the plaintiff of its commission. If less than this is pleaded, or if the evidence comes short of this, it can only go to the question of damages. *ib*

6. Where no justification is pleaded, evidence showing grounds for suspecting the plaintiff of the commission of a crime, is admissible upon the question of damages only; but upon that point it is material as going to relieve the defendant from the imputation of having acted from improper motives. *ib*

7. Actions for malicious prosecution and for false imprisonment are essentially distinct, and require different rules both of pleading and evidence. *ib*

FOREIGN CORPORATION.

1. No power can be exercised by the supreme court, over a foreign corporation, in proceedings commenced by a stockholder, to wind up its affairs. *Murray v. Vanderbilt*, 140

2. But for the purpose of preserving the property of such corporation,

for the benefit of creditors or stockholders, a court of equity has ample power to take charge of it, and to appoint a receiver. *ib*

FRAUDS, STATUTE OF.

What is an insufficient memorandum in writing of a contract for the sale of goods for the price of fifty dollars or more, within the statute of frauds. *Calkins v. Falk*, 620

G

GRANT.

See PRINCIPAL AND AGENT, 9.

GRANTOR AND GRANTEE.

Although a right of action to recover for damages already sustained, prior to the execution of a conveyance, may well be deemed to remain in the grantor, yet a right of action or remedy for future encroachments upon the grantee's rights—as for a neglect or refusal to restore the waters of a stream to their accustomed channel—resides in the grantee of the lands. *Corning v. Troy Iron and Nail Factory*, 311

GUARANTY.

1. Where a guaranty of a promissory note is a separate instrument from the note, title to it will pass by delivery, with the note, for a good consideration. A written assignment is unnecessary. *Gould v. Ellery*, 163

2. The transfer of the note guarantied, and delivery with it of the guaranty, carries with it the title to the guaranty, without any written assignment. *ib*

GUARDIAN AD LITEM.

A guardian ad litem cannot of his own mere motion, and without the order of the court, make an absolute settlement of the whole matter

in controversy, so as to bind the infant. *Edsall v. Vandemark*, 589

GUARDIAN AND WARD.

1. It is not an inflexible rule that the commissions of a guardian cover every thing which can be allowed to him for his services respecting the estate of his ward. *Morgan v. Morgan*, 20
2. The rule is fairly deducible from the cases that where extra compensation has been applied for and denied, the services for which such remuneration was asked were strictly within the official duties of the executor, guardian or trustee; and that no other recompense can be allowed than such as the statute provides for conducting the administration of the estate in all that legitimately pertains to it. *ib*
3. But the rule is not so narrow and restricted that it denies all compensation to a guardian for services of a personal or professional nature, rendered by him for the benefit of the ward, and in doing which he has bestowed personal labor and incurred actual expenses, and which have been useful and serviceable to the estate. *MORGAN, J. dissented.* *ib*
4. The act of the legislature, of March 20, 1860, constituting every married woman the joint guardian of her children, with her husband, did not limit the guardianship of the wife to the period of coverture, but in case of the death of the husband, the power survived to the wife, and the husband could not deprive her of the right by appointing a testamentary guardian. *People ex rel. Boice v. Boice*, 307
5. The legislature, by the act of April 10, 1862, amending the act of March 20, 1860, and repealing the above provision thereof, did not intend to restore the power given to the father, by the revised statutes, of appointing a testamentary guardian, or to infringe materially upon the mother's right to the custody of her children, in case she survived her husband. *ib*

H

HIGHWAYS.

1. Subdivision three of section one of the act of February 23, 1880, regulating highways in the counties of Kings, Queens and Suffolk, makes it the duty of the commissioners of highways "to cause such roads used as highways as shall have been laid out, but not sufficiently described, and such as were used as highways for twenty years or more next preceding the 21st of March, 1797, and which shall have been worked and used as such constantly for the last six years, but not recorded, to be ascertained, described and entered of record in the town clerk's office." *Held* that in executing this injunction of the statute the commissioners are not to lay out a new road, or to enlarge the limits of an old one. *Talmage v. Hunting*, 654
2. The lands cannot be taken for either purpose without due process of law, and without awarding compensation therefor to the owners. *ib*
3. The commissioners are to ascertain the length and breadth, the lines and limits, of a road which had not been formally laid out, but which had become a public road by dedication of the landowners to be presumed from immemorial use; to incorporate a description of such length and breadth, lines and limits, in the form of an order; and enter it of record in the town clerk's office, as a memorial for present and future use. *ib*
4. Where commissioners, instead of ascertaining and making a record of the lines, length, breadth, courses and distances of an existing road as it had existed for twenty years before the 21st of March, 1797, alleged in their order that difficulties had arisen, as to the boundary lines of the street; that they had heard testimony and collected the circumstances relative thereto, and proceeded to survey, stake out and record such width of highway as appeared to be necessary for the public convenience; and they surveyed and staked out the

road, not as it had been used and then actually existed; nor as the landowners had dedicated it; but of such width as appeared to be necessary for the public convenience; *Held* that the commissioners had no power to make such an order, and the same was void. *ib*

See MUNICIPAL CORPORATIONS, 7 to 14.
STREETS.

HOMESTEAD EXEMPTION.

The homestead exemption act, passed April 10, 1850, does not contemplate the exemption of a homestead from sale on execution issued upon a judgment for a cause of action sounding in *tort*; nor on an execution issued in such action on a judgment for the defendant for costs. *Lathrop v. Singer*, 396

HUSBAND AND WIFE.

1. A married woman can charge the whole, or a portion of her separate estate as a surety for her husband, the intention to charge such separate estate being declared in the contract. *Barnett v. Lichtenstein*, 194
2. And, although the instrument by which she promises to pay the debt of her husband out of her separate estate declares that the consideration is for the benefit of her separate estate, instead of stating the real consideration, this will not vitiate the instrument or exempt the wife's separate estate, provided she expressly charges her separate estate in the instrument. *INGRAHAM J. dissented.* *ib*
3. Where, by a parol ante-nuptial agreement, the intended husband agreed on his part to convey certain real estate to his intended wife, and she in consideration thereof agreed to marry him, and pay his existing debts, and after the marriage the husband conveyed the land to E. for the benefit of the wife, and she paid her husband's debts out of her individual earnings and separate estate; *Held* that this was a contract of purchase, as to the real estate, and was not a voluntary settlement. *Dyggert v. Remerschneider*, 417
4. *Held, also*, that although the payment of the larger proportion of her husband's debts was made from the wife's earnings after marriage, which in law would otherwise have been her husband's means, yet that her right to it was an equitable right under the executory contract made before marriage, and was based upon a good consideration proceeding from her, to wit, that of marriage and the advance of her separate estate. *ib*
5. *Held further*, that the agreement on the part of the husband that his wife's future earnings should be applied to the payment of his own then existing debts, was not fraudulent as against his subsequent creditors. *ib*
6. That the stipulations of the ante-nuptial agreement on the part of the wife having been fully performed by her after marriage, she was entitled to have the agreement specifically performed, as against her husband. *ib*
7. That the husband having subsequently executed the agreement by causing the land to be conveyed to his wife, in pursuance of its terms, she held the land by a superior claim of equity to her husband's subsequent creditors; and her equity related back to the time when the conveyance ought to have been made by the terms of the agreement. *ib*
8. That whether the agreement, when executed, was to be regarded as a voluntary settlement or a purchase, the right of the wife was in equity to be preferred to the claim of a subsequent judgment creditor of the husband. *ib*

See GUARDIAN AND WARD, 4, 5.
WILL, 3, 4.

INJUNCTION.

1. The want of jurisdiction of the court over the subject matter of the action will not prevent the defendant from recovering costs, on the dismissal of the complaint; nor

will it deprive the defendant of the right to damages upon the injunction-undertaking, when the injunction is dissolved. LEONARD, J. dissented. *Cumberland Coal and Iron Co. v. Hoffman Steam Coal Co.* 16

2. The undertaking given on the issuing of an injunction is for the benefit of all the defendants that are enjoined, whether served or not. Hence, if a party, without any service of the summons or injunction upon him, obeys the injunction, he may, without any appearance, have a reference to ascertain the amount of damages sustained by him, by reason of the injunction. LEONARD, J. dissented. *ib*

See AGREEMENT, 4, 5.
EQUITY, 1.

INSURANCE.

1. Where a purchaser agrees to insure for the benefit of his vendor and to assign the policy for his security, and he subsequently procures the building to be insured, but does not assign the policy to the vendor, the agreement operates as an equitable assignment of the money payable upon the policy, in case of loss, but not as an assignment of the policy. Hence, the case does not come within the terms of a clause in the policy, declaring that the interest of the insured in the policy is not assignable, unless with the consent in writing of the insurers, and that the policy shall become void if such interest is transferred or terminated without such consent. LOTT, J. dissented. *Cromwell v. Brooklyn Fire Ins. Co.* 227
2. On the 1st of May, 1852, the defendant insured the plaintiffs' stock in trade in a store No. 146 River street, Troy, for \$2500 for three years. The 18th article of the policy provided that "in case any other policy of insurance has been or shall be issued covering the whole or any portion of the property insured by this company," the policy issued by the defendant should be void; unless the company had notice thereof and gave a written consent thereto. On the 9th of August, 1854, the goods were, with the consent of the defendant, removed to

an adjoining store, in the same building, known as No. 148. At that time the insured had a stock of goods of the same description, in No. 148, which had been insured for \$2500 by another company, January 12, 1852, for five years. The defendant gave no consent to such prior insurance, and had no knowledge of it. *Held* that this was not a case of double insurance, in violation of the 18th article of the policy. HOGEBOM, J. dissented. *Voss v. Hamilton Mutual Ins. Co.* 302

J

JAIL LIMITS.

1. The jail limits of the county of Kings were fixed by the statute of 1831, which declared that "the jail liberties of the county of Kings shall be so extended as to include the whole of the towns of Flatbush and Brooklyn in said county." In 1834, by an act incorporating the city it was declared that the town of Brooklyn should thereafter constitute and be known by the name of the city of Brooklyn. And by the act of April 17th, 1854, the cities of Brooklyn and Williamsburgh and the town of Bushwick were consolidated into one municipal government and city, to be known as the city of Brooklyn. *Held* that the extension of the jail liberties, by the act of 1831, so as to include the whole of the towns of Flatbush and Brooklyn, carried the limits to the exterior lines of those two towns, which were fixed and known boundaries; and that the subsequent creation of a municipal corporation known as the city of Brooklyn, with a large addition to its territory, could not be regarded as affecting the jail limits, so as to make them co-extensive with the bounds of the city. *Chamberlain v. Campbell*, 642
2. The jail, of which the sheriff has the control, is not a municipal institution, nor needed for municipal purposes. It is a county institution, used exclusively for county purposes. And the jail liberties are but an enlargement of the limits or outer walls of the jail. *ib*

3. Any change which the legislature may make in the limits of the town or city cannot be regarded as affecting the limits or liberties of the jail, without some additional words indicating such a purpose. *ib*

JURISDICTION.

See INJUNCTION, 1.

JUSTICE'S COURT.

See COUNTY COURT.

JUSTICE OF THE PEACE.

A justice of the peace has no right to issue a warrant of arrest, in a criminal case, upon a complaint stating the facts on information and belief, where the attendance of the person from whom the information was derived can be compelled. *Comfort v. Fulton*, 56

See FALSE IMPRISONMENT, 1.

K

KINGS COUNTY.

See JAIL LIMITS.

L

LANDLORD AND TENANT.

1. Where a lessee has been evicted from a portion of the privileges granted by the lease, by a paramount title in a stranger, he is discharged from the rent *pro tanto*, and is entitled to an apportionment, by which rent shall be paid only in respect to the residue. *Carter v. Burr*, 59

2. But in an action for rent, the lessee is not entitled to recoupe the value of the lease over and above the rent, nor for rents he might have realized, or for special damages incurred by reason of being evicted

from a portion of the privileges granted. *ib*

See LEASE.

LARCENY.

See MALICIOUS TRESPASS.

LEASE.

1. A lease in fee, or in perpetuity, is a "conveyance of real estate" within the provisions of the statute forbidding the implication of covenants; and if it contains no covenants of seizin, warranty or quiet enjoyment, none can be implied. *Carter v. Burr*, 59

2. An under-lease, by the lessee of premises, for the whole unexpired term, reserving the right to re-enter, is a sub-lease and not an assignment, and the party giving the sub-lease can re-enter for a breach of the condition, although there is no reversion remaining in him. *People ex rel. Elston v. Robertson*, 9

3. A lease was for the term of ten years, to commence on the 1st day of May, 1852, and to end on the 1st day of May 1862. W., the assignee of the lessee, underlet the premises to E. from the first day of May, 1856, to the 1st day of May, 1862. W. then assigned the original lease to R. Held that the original lease was to be construed as expiring at 12 o'clock M. of the 1st of May, 1862, and the sub-lease as expiring at 12 o'clock at night of the 30th of April, 1862. And that consequently there was a period of time between the end of the 30th of April and 12 M. of the 1st of May, during which R. had the right of re-entry and of possession of the premises. *ib*

4. It was stipulated in a lease that at the expiration of the term of three years from the first of July, 1837, or of any subsequent term of three years, the lessor, if dissatisfied with the amount of rent agreed to be paid, might give notice to the lessee of such dissatisfaction, and claim an increase; and if the claim was not adjusted, that he might make ap-

plication to "the chancellor of the state of New York, for the time being," for the appointment of three appraisers to fix the amount of the rent. One of the terms of three years expired on the 1st of June, 1855. *Held* that the parties intended, by the term chancellor, in the lease, the court of chancery, and not the mere personal incumbent of the office of chancellor. And the court of chancery having been abolished, by the constitution of 1846, and the supreme court having succeeded to all its powers and duties, *Held, further*, that the latter court was the proper tribunal to which to apply for the appointment of appraisers. *New York Central Rail Road Co. v. Saratoga and Schenectady Rail Road Co.* 289

6. And that an order made by a justice of the court, at a special term thereof, on notice, was a valid execution of the power. *ib*
6. Notice of dissatisfaction having been given by the lessor, on the 22d of June, to apply to a term which was to commence at the expiration of that month; *Held* that the notice was seasonable and proper, and not having been revoked, that it remained operative at the close of the term, on the last of June. *ib*
7. *Held*, also, that a defect in the time or mode of service of the notice was an irregularity that might be waived; and that no objection having been made by the lessee, to the notice, as irregular or premature, it must be deemed to have waived all objections on that ground. *ib*

LEGACY.

1. When a parent, or other person *in loco parentis*, bequeaths a legacy to a child or grandchild, and afterwards, in his lifetime, gives a portion or makes a provision for the same child or grandchild, without expressing it to be in lieu of the legacy, it will in general be deemed a satisfaction or redemption of the legacy. *Hine v. Hine*, 507
2. A legacy to a child, regarded as a portion, is a deliberate distribution to such child, or among his children,

of such portions of his estate as the testator thinks fit. If the testator, during his life, advances that which he has adjudged to be the due portion of the legatee, the law presumes that he has satisfied the portion; and this presumption must prevail until overcome by evidence of a contrary intent on the part of the testator. *ib*

3. A gift by way of advancement, in order to work a satisfaction of the legacy, need not be in all respects identical with the latter. If they are substantially the same, a small variance in the time of payment, or other trifling difference, will not vary the application of the rule. *ib*
4. When a legacy is given for a particular purpose specified in the will, and the testator, during his life, accomplishes the same purpose, or furnishes the intended legatee and beneficiary with money for that purpose, the legacy is satisfied. *ib*

LEGAL TENDER NOTES.

See CONSTITUTIONAL LAW, 2, 3.

LEGATEE.

See EXECUTORS AND ADMINISTRATORS.

LIMITATIONS, STATUTE OF.

1. A promissory note given to a mutual insurance company organized under the general law of 1849, for shares of its capital stock, and in terms payable in such portions and at such time or times as the directors of the company may require, and showing on its face that it was given for capital stock of the company, is, in legal effect, payable on demand, i. e. at its date. *Colgate v. Buckingham*, 177
2. The statute of limitations begins to run against such a note at the time it is given, and at the expiration of six years from that time, will constitute a good defense. *ib*
3. In respect to their creditors, co-partners, after the dissolution, are

joint debtors, and nothing more. What the joint makers of a promissory note may not do to enlarge, prolong or continue existing liabilities, or to create a new one in regard to the debt, copartners, after dissolution, may not do. *Payne v. Slate*, 634

4. And whoever makes a promise or an acknowledgment, either orally or in writing, or by a payment of principal or interest, which is to have the effect to rescue a debt from the force of the statute of limitations, must be the party to be charged, or be duly authorized by the party to be charged. *ib*

5. One copartner cannot, after the dissolution of the firm, bind his copartner by a new promise, or revive a debt barred by the statute of limitations by a promise, or by a payment of principal or interest, made either before or after the lapse of the six years mentioned in the statute. *ib*

6. Where the plaintiff left with the defendants a sum of money, taking from them a receipt for the amount, specifying that it was "to his credit on our books, at six per cent interest," but containing no promise, and mentioning no time of payment; *Held* that this was to be construed as a loan or deposit of money to be repaid on demand, with interest. *ib*

7. And that no action would lie to recover the money, mentioned in the receipt, until after an actual demand and refusal. *ib*

M

MALICIOUS PROSECUTION.

See FALSE IMPRISONMENT.

MALICIOUS TRESPASS.

Severing and carrying away by one act, a growing crop of less than \$25 in value, is no criminal offense, unless charged to have been done maliciously; and if so charged, it

is a misdemeanor, as a "malicious trespass;" but it is not stealing. *Comfort v. Fulton*, 58

MANDAMUS.

1. Where an officer of a municipal corporation undertakes to set at naught the corporate will, by refusing to execute or deliver the bonds of the corporation in payment of the price of lands purchased by the corporation, a *mandamus* is the appropriate and proper remedy. *People ex rel. Taylor v. Brennan*, 522

2. The writ may also be applied for by the vendor who is beneficially interested in enforcing the contract, after a resolution has been passed by the common council directing the officer to carry out and complete the purchase; where the corporation assents to the making of the application by the vendor. *ib*

3. Where T. offered to sell to the city of New York certain property, either for cash or corporate bonds, and the corporation, by resolution, accepted the offer, the payment of the price to be made in corporate bonds; *Held* that this constituted an agreement whereby payment was to be made in bonds; and that there being no legal remedy other than a *mandamus*, by which the vendor could obtain the bonds, that remedy was appropriate. *ib*

4. In all cases where an officer of a corporation refuses to comply with the lawful directions of the corporate body, and a *mandamus* is sued out by the party for whose benefit and in whose favor the directions are given, with the consent of the corporate body, the party will be relieved in that manner, without being put to an action against the corporation, for a specific performance. *ib*

5. Where, on an order to show cause why a peremptory *mandamus* should not issue, the facts are admitted, or the excuse offered is insufficient, the court will, if the decision be in favor of the relator, direct a peremptory *mandamus*, without the previous issuing of an

- alternative writ. *CLERKE, J. dissented.* *ib*
6. If the only material disputed fact does not, even conceding it to be as the defendant alleges, furnish any satisfactory cause against issuing the mandamus, it is unnecessary to direct an alternative writ for the purpose of having a trial respecting that fact. *ib*
 7. Where by a resolution of the common council of the city of New York, the comptroller of the city was directed to carry out and complete a purchase of real estate on behalf of the city, by issuing the corporate bonds, for the purchase money; *Held* that it was no excuse for the non-performance of this duty, by the comptroller, that the vendors had no title to the land, but the title was already in the city. *ib*
 8. *Held* also, that the fact that the title was derived from D. who had purchased the property from the city and had taken a conveyance of it while he was an officer of the corporation, and thus, incapacitated to purchase from the city, would not excuse the comptroller from complying with the resolution. *ib*
 9. An order for a mandamus, which directs that the comptroller of the city of New York shall be required by such writ to procure the signature of the mayor, and the corporate seal to be affixed to bonds, is erroneous. The writ should only require the comptroller to do those acts which lie in his department, and are personal to himself, viz: the preparation of the bonds, and his own signature to them. *ib*
 10. The act of April 24, 1863, directing the mayor and comptroller of the city of New York to designate four papers "having the largest daily circulation," in which corporation advertisements shall be published, requires the designation to be of the four papers published in the city, having the largest daily circulation, and is not to be so construed as to restrict such circulation to the city and county of New York. *People ex rel. Opdyke v. Brennan,* 651
 11. If the comptroller refuses to meet the mayor and act with him, in the matter, a *mandamus* will lie to compel him to unite with the mayor in designating the four papers having the largest daily circulation; but as the determination of the question of fact which four papers have the largest daily circulation involves the consideration of evidence and an adjudication upon such evidence, the writ should not command the comptroller to unite with the mayor in designating four certain papers named therein. *ib*
- ### MARRIAGE SETTLEMENT.
1. Where a marriage settlement, in itself, provides for the payment of all existing debts, and such debts are actually paid, in pursuance of it, it is not fraudulent in law, *Dyger v. Renerschnneider,* 417
 2. In such a case, as to all subsequent creditors, such a settlement is not presumptively fraudulent in fact. *ib*
- ### See HUSBAND AND WIFE.
- ### MARRIED WOMEN.
1. A married woman not being able to make a contract valid at law, so as to bind herself personally, if she has a separate estate and contracts debts for her own benefit, on the credit of it, it is just and right that a court of equity should enforce payment of the debts out of her separate estate. *Per SUTHERLAND, P. J. Ledeliey v. Powers,* 555
 2. But where a married woman, on purchasing a farm as her separate estate, also purchased certain stock and farming implements thereon, and executed a mortgage of the chattels, to secure the payment of the price thereof, to the vendor, the payment of which chattel mortgage was guarantied by two other persons; *Held* that the vendor, by accepting the chattel mortgage and guaranty, must be deemed to have trusted to the same as his security for the payment of the price; and that, in the absence of any finding that the chattels were bought or the

debt incurred for the benefit of the wife's separate estate, the same could not be charged with the payment. *ib*

See HUSBAND AND WIFE.
WILL, 3, 4.

MEDICAL TESTIMONY.

See EVIDENCE, 4.

METROPOLITAN POLICE.

See ARREST.

MILL-SITES.

See DAMS.

MORTGAGE.

1. A complaint was filed against a mortgagee, by the plaintiff, in two capacities: 1. As the owner of the mortgaged premises, to obtain a decree declaring the mortgage satisfied, and removing the apparent incumbrance from the land; or, if the mortgage was not entirely paid, to apply upon the same so much of certain claims against the mortgagee of which he was assignee as would suffice to extinguish the same; 2. As assignee of those claims, to obtain a judgment against the defendant for the amount thereof, or so much of such amount as should remain after satisfying the mortgage. There was also a prayer for general relief, but no specific prayer for leave to *redeem* the mortgage. *Held* that as the facts embraced in the pleadings and proved on the trial embraced a fit case for that relief, and as the claim for such relief was made at the close of the case, and was susceptible of being granted, under the allegations and proofs and the prayer for general relief, the decree should have provided for it, by declaring the amount due upon the mortgage, and that upon payment thereof by the plaintiff the mortgage should be canceled. *Beach v. Cooke*, 360

2. Where a mortgage is made to two persons, describing them as "executors," but the money is made pay-

able to them or their personal representatives, it is the duty of the register to receive and *record* a certificate of the payment of the mortgage, duly executed by the surviving executor, on actual payment of the money to him. *People ex rel. Eagle v. Keyser*, 587

3. The general rule is that there must be an eviction of the mortgagor before he can be relieved from the mortgage on the ground of a failure of the consideration of the mortgage, or of the title conveyed by the mortgage. *Curtiss v. Bush*, 661

4. It seems to have been held in all the cases, that there must be an eviction, or something equivalent thereto, to enable a mortgagor to defend against the mortgage, on the ground of a failure of the consideration or the title. *Per Johnson, J.* *ib*

5. S. conveyed land to B. with a covenant against his own acts, taking back a mortgage for the purchase money. The premises were in fact incumbered at the time, by a judgment against S. under which they were subsequently sold; H. becoming the purchaser at the sheriff's sale, and taking a certificate from the sheriff, which he afterwards assigned to J., who procured a deed from the sheriff and then conveyed the premises to B. J. acted merely as the agent of B., whose possession was not disturbed, and who sustained no damage by reason of the judgment and the sale of the premises thereunder. *Held* that there was neither an eviction of B. the mortgagor, nor its equivalent; there never having been any one who could have rightfully evicted him. *ib*

6. *Held, also*, that notwithstanding the time for redemption from the sale had expired, the sale had not become absolute, so as, by its own force, to extinguish the title derived by B. from S.; but that the extinguishment was not effected until the sale was completed by the sheriff's deed. *ib*

MULTIPLICITY OF SUITS.

See EQUITY, 3.

MUNICIPAL CORPORATIONS.

1. Where the trustees of a village, having determined to grade an avenue and build a bridge thereon, over a river, proceeded to establish the district of assessment, procured plans and specifications for the work and advertised for proposals from contractors, and at a meeting of the board, held on the 8th of November, 1860, the proposals were opened, and the contract awarded; they having first amended the specifications, so as to extend the time for the completion of the work; *Held* that such extension of the time did not have the effect to vitiate all the proceedings. *People ex rel. Knox v. Village of Yonkers*, 266
2. A provision, in a village charter, that the proposals for constructing a public work shall be opened on the day named in the notice, "or upon such other day as the trustees may adjourn to, for that purpose," is directory merely. It is not essential that the time for opening and looking at the proposals shall be continued by regular adjournment from time to time. *ib*
3. The trustees are to open the proposals, and accept that which is most favorable. This they may do at the day mentioned in the notice, or at the adjourned day, or at a day to which they had not adjourned (if the adjourned meeting fail to take place.) *ib*
4. Ordinarily, the combination in one proceeding of improvements so dissimilar in their natures as the grading of a street and erecting a bridge thereon, and the construction of a sewer, would be vicious in principle. But where the sewer is a part of the bridge, having no other purpose to serve than to relieve the same from the effect of the water which collects upon the surface of the street, no valid objection exists. *ib*
5. The power of commissioners, in a street assessment, extends only to known, ascertained and fixed expenses. All others are illegal and void. *ib*
6. Accordingly, where the estimate of the expenses of an improvement, after enumerating specifically various items, amounting in the aggregate to \$1216.74, contained a charge of \$460.05 for "contingencies;" *Held* that the insertion of this item rendered the assessment illegal and void. *ib*
7. Where municipal corporations or individuals are charged with a duty, as in the case of streets or highways, with the duty of keeping them in repair and exercising a general oversight in regard to their condition and safety, they, or the body they represent, are liable for all injuries happening by reason of their negligence. *Wendell v. Mayor &c. of Troy*, 329
8. They are bound to keep the streets and highways in a proper state of repair, and free from all obstructions or defects in the road bed which vigilance and care can detect and remove; and this whether or not the work or repairs are being done by a contractor under them, the negligence of whose servants causes the injury complained of. *ib*
9. They may, under certain circumstances, be temporarily exempt from liability where repairs or other work and labor in the street are performed by contractors for the work, and the injury complained of occurs in the progress of the work by recklessness or negligence on the part of the servants of those contractors. *ib*
10. The public body, represented by such corporation or officer, is also, in such case, responsible for injuries thus occasioned, because it was illegal and improper and a breach of duty in them to allow a public thoroughfare to be thus diverted to a mere private use. *ib*
11. This liability is absolute and complete notwithstanding the work may have been done with care and the structure erected in an apparently proper manner; because its erection was in itself unlawful, and no amount of care or labor bestowed could sanction such illegal appropriation of the street or highway. *ib*

12. If such work is for any reason tolerated by the public authorities, it is their duty to exercise a supervision over its construction and condition, and it is negligence and a breach of duty in them to omit to exercise such supervision. *ib*

13. If such supervision is exercised, but not to such an extent as is demanded by proper and reasonable care, nor so as to secure the safety of the traveling public, the corporation or person required to exercise such supervision is guilty of negligence, and the injuries arising from such lack of efficient supervision and care are injuries for which they are responsible. *ib*

14. If the injury results from some inherent defect or vice in the unauthorized structure itself, or the mode of constructing it, so as not to be apparent even to a careful external observer, the public or public authorities are nevertheless liable, 1. Because the structure was under any circumstances unauthorized; and 2d. Because the exercise of competent care and vigilance would have avoided such defects in the structure or mode of construction as would result in injury to the traveling public. *ib*.

15. A power in a municipal corporation to purchase carries with it a power to incur an indebtedness for the purchase money, and to provide for the payment of the indebtedness; unless that power is so restricted that it cannot be exercised unless there are sufficient funds in hand to pay for the property. *People ex rel. Taylor v. Brennan*, 522

N

NEGLIGENCE.

See MUNICIPAL CORPORATIONS, 7, 8, 9, 12, 13.

NEW YORK CENTRAL RAIL ROAD CO.

See RAIL ROAD COMPANIES.

NEW YORK (CITY OF.)

1. The board of supervisors of the city and county of New York have pow-

er to fix or increase the salary of the clerk of a police court; more especially if such increase is made in pursuance of an act of the legislature, or is subsequently ratified by them. *Devoy v. Mayor &c. of New York*, 169

2. The change of the appointing power from the mayor and common council to the board of police did not relieve the corporation from liability to pay whatever it was bound to pay, before. *ib*

8. If the corporation of New York, on purchasing property, has no funds which can be appropriated to the payment of the price, it may purchase on credit, and may issue its obligations promising to pay the indebtedness at a future time, and make subsequent provision for their payment. *People ex rel. Taylor v. Brennan*, 522

See MANDAMUS, 7 to 11.

NOTICE.

See DOWER, 1.

NUISANCE.

See AGREEMENT, 6.
EJECTMENT, 2.
STREETS.

O

ONUS PROBANDI.

See CHATTEL MORTGAGE, 5.

OPINIONS OF WITNESSES.

See EVIDENCE, 4.
VENDOR AND PURCHASER, 3.

P

PARTNERSHIP.

1. Where a special partner does not pay, *in cash* the amount of capital agreed to be contributed by him,

but makes the payment in goods &c., this is not a compliance with the statute respecting limited partnerships. *Haviland v. Chace*, 283

2. If the provisions of the statute are not complied with, the limited partnership is not formed, and if a false affidavit in respect to the payment in cash of the sums alleged to have been contributed by the special partners is filed, all the partners will be liable for *all* the engagements of the partnership, as general partners. *ib*

3. The liability of each partner in such a case, will not be limited to the proposed term of the special partnership, but extends to all the engagements of the partnership, so long as it has a legal existence. *Gould, J. dissented.* *ib*

See LIMITATIONS, STATUTE OF 3, 4, 5.

PENALTIES AND FORFEITURES.

Courts of equity will relieve against penalties and forfeitures. *Spaulding v. Hallenbeck*, 79

PLANK ROADS.

1. Where one owns, and lives upon, a farm, and also owns another parcel of land which is entirely separate from, and not contiguous to, the homestead, his team, while driven upon a plank road in going to and from work on the detached parcel of land, is liable to the payment of half tolls, if such parcel is within a mile of the toll-gate. *Cummings v. Waring*, 630

2. The provision of the statute, in relation to plank roads and turnpike roads, declaring that "farmers living on their farms within one mile of any gate," &c., "shall be permitted to pass the same free of toll, when going to or from work on said farms," does not apply to such a case. *ib*

PLEADING.

See ATTACHMENT, 6.

FALSE IMPRISONMENT, 5.
MORTGAGE, 1.

POLICE COURT.

See NEW YORK, (CITY OF.) 1, 2.

POSSESSION.

See CHATTEL MORTGAGE, 1, 4, 5, 6.

PRACTICE.

See APPEAL.

PRINCIPAL AND AGENT.

1. Money having been paid voluntarily, to an agent, for his principal, by a party who could not have been compelled to make such payment, it becomes the property of the principal, in the agent's hands, for which the agent should account. He has no right to refuse payment to his principal because the latter had not a legal claim to the money paid. *Murray v. Vanderbilt*, 140

2. An agent has no right to dispute the title of his principal to moneys received by him for the use of the principal. Nor can he resist an action for the amount so received, on the ground that the money was paid on an illegal contract between the original parties. *ib*

3. An agent acting under a general power of attorney, giving him power to draw or indorse checks for and in the name of his principal, has no authority to overdraw his principal's account at the bank. *Union Bank v. Mott*, 180

4. And if over-drafts are made upon such account, by the agent, through a fraudulent collusion with a book-keeper in the bank, without the knowledge or sanction of the principal, who receives no part of the proceeds, the loss must fall upon the bank; such loss having been occasioned by the fraud of its own clerk and servant, in the performance of his duties in the bank. *ib*

5. The bank must look for redress to its book-keeper, and his sureties, and to those who participated in the frauds. *ib*

6. Where goods are bought by an agent who does not disclose the

name of his principal, at the time of the purchase, the principal, when discovered, is liable to the vendor on the contract made by the agent. *McMonnies v. Mackay*, 561

7. Where an agent, on purchasing goods, although disclosing his agency, gives his own notes for the price, which are received by the vendor in payment, the principal is not liable for the purchase money. *ib*

8. If vendors deal with an agent as principal, and without any knowledge, inquiry or information as to his agency, taking the promissory notes of the agent in payment of the price of the goods, and the agent subsequently effects a compromise with the holders of the notes, by which the latter accept from him certain moneys and securities in full payment and discharge of the notes; this will discharge the employer of the agent from all liability for the price of the goods purchased. *ib*

9. Land was purchased, at a foreclosure sale, by H. as the agent of and for the benefit of C., with money furnished mostly by C. and in part lent him by H. The title was taken in H.'s name, without the consent of C. *Held* that the title was to be regarded as taken and held by H. for the benefit of C.; and that, upon a bill in equity being filed for that purpose, by C. a reconveyance by H. would be ordered. *Safford v. Hynds*, 625

10. And that a tender of the money advanced by H. for C. was not necessary to enable C. to maintain an action to compel a reconveyance of the property. *ib*

11. *Held also*, that C. being the real owner of the property, under an equitable title, and S. being in possession rightfully, by the consent and authority of C., he had such a right to the possession as entitled him to maintain an action of trespass, against H. and to recover for any damages done to his possession by the latter. *ib*

12. An agent, appointed to attend a foreclosure sale and bid off the prop-

erty for the benefit of his employer, has no right to purchase the same in his own name. When an agent thus exceeds his authority, the purchase will be held to be made for the benefit of his principal, at the election of the latter; even though the agent takes the title in his own name. *ib*

13. The provision of the statute, declaring that where a grant for a valuable consideration is made by one person and the consideration paid by another, the title shall vest absolutely in the alienee, does not apply to a case where the deed is taken in the name of one acting merely as agent, with the consent of the person paying the consideration. *ib*

14. The title of the owner of property in things movable can be divested and passed over to another only by his own consent and voluntary act, or by operation of law. *Farrington v. The Park Bank*, 645

15. If his consent and voluntary act is made and signified by an agent or person acting in his behalf, such agent or person must have the requisite authority from his principal for that purpose. *ib*

See CORPORATION, 3, 4, 5.
PROMISSORY NOTES, 9.

PRINCIPAL AND SURETY.

See AGREEMENT, 2, 3.
REPLEVIN, 1, 2.
TOWN COLLECTORS.

PROMISSORY NOTES.

1. Where, after two persons had signed a promissory note, not negotiable, a third person wrote his name across the back, and it was thereupon transferred to the payee, who parted with the full consideration mentioned in it upon the credit of the note, the note having been in fact made to obtain such consideration; *Held* that the person so writing his name upon the back of the note was not an indorser, nor a guarantor, but was a joint promisor with the other signers; and that the precise locality of his signature,

upon the note, was immaterial.
Richards v. Waring. 42

2. The code of procedure has not abrogated the distinction that existed in the law merchant, between negotiable and non-negotiable paper. *ib*
3. Where promissory notes, made and indorsed by D. & D. without any consideration whatever, as accommodation paper for S., to enable him to take up and renew other notes previously made and indorsed by D. & D. for his benefit, were delivered for that purpose to S. who diverted them from that purpose and transferred them to a bank, upon its agreement to surrender and give back to him certain notes of S. then held by the bank; but the bank afterwards refused to give up the notes of S. and claimed to hold the notes of D. & D. as general collateral security for the debt of S.; *Held* that no action could be maintained by the bank upon the accommodation notes. *Ocean Bank v. Dill,* 577
4. D. being the holder of a promissory note for \$600, made by S. and indorsed by C., which was overdue, and had been protested for non-payment, and C. duly charged as indorser; H. as agent of S. brought to D. from S. an accepted draft for \$500, on a third party, which had some forty days to run before maturity; also a new note of S., not yet due, for \$165.50, being the balance remaining due on the old note, after deducting the amount of the draft. H. indorsed over the draft and the new note to D., who received the same, agreeing that he would not receive them in payment upon the original note, but would hold them until the maturity of the new note and draft, and then enforce the old note if they were not paid. *Held* that there was a valid and binding agreement to extend the time of payment of the original note; and that such extension of the time discharged the indorser. *Dorton v. Christie,* 610
5. *Held*, also, that whatever might have been the intention of the parties as to taking the new note and draft as collateral, yet if the time of payment was actually extended
- until the maturity of the new note, then the indorser was discharged. *ib*
6. A promissory note past due and dishonored, and which has been protested for non-payment, although it passes by delivery, and an action may be maintained upon it, by the holder, subject to the equities of the parties thereto, cannot be said to pass in the usual course of trade and business. *Farrington v. The Park Bank,* 645
7. Although such paper will pass by delivery, and the holder may maintain an action upon it, the substantial elements of commercial paper for the purposes of trade are wanting, in the absence of an unqualified obligation of the parties to it to pay at maturity. *ib*
8. The holder takes it in the light of an assignee of the person from whom he receives it, rather than as an indorsee according to the usage of trade; and he therefore takes just such title, and no other, as his assignor had to it, at the time of the transfer. *ib*
9. Where B., being authorized by the owners of a protested note, as their agent, to take it to a particular bank and leave the same with the bank for collection, but without authority to sell or pledge it, converted it to another and a different purpose, by depositing it for collection on his own account and to be held as security for his indebtedness; *Held* that no title passed to the bank; B. having no power to make a sale or transfer in the nature of a pledge which would divest the owners of their interest in the note. *ib*

See GUARANTY.

LIMITATIONS, STATUTE OF, 1, 2, 3.
WARRANTY, 2.

R

RAIL ROADS.

1. The appropriation of a highway, by a rail road company which enters upon and occupies such highway

with the track of its road, is the imposition of an additional burden upon, and a taking of the property of, the owner of the fee, within the meaning of the constitutional provision which forbids such taking without compensation; and the company can derive no title under acts of the legislature and the license of municipal authorities, without the consent of the owner of the fee, or the appraisal and payment of his damages in the mode provided by law. *Craig v. Rochester City and Brighton Rail Road Co.* 494

2. There is no distinction in this respect, between rail roads operated by steam, and those upon which animals, only, are used as a motive power. *ib*

RAIL ROAD COMPANIES.

1. By the act of April 2, 1853, authorizing the consolidation of certain rail road companies, the interests and rights of property of the Utica and Schenectady Rail Road Company became vested in the New York Central Rail Road Company; and the latter company became the proper representative of the former, in regard to leases executed by it, and entitled to the benefit of the provisions therein contained. *New York Central Rail Road Company v. The Saratoga and Schenectady Rail Road Company,* 289
2. The rent reserved in a lease executed by the Utica and Schenectady Rail Road Company of a part of its track, being a compensation for the use of such track, the right to it passed, as a necessary appurtenance to the ownership of the land and the superstructure upon it, to the New York Central Rail Road Company, under the act of consolidation and the agreement entered into between the several rail road companies in pursuance of it. *ib*

See AGREEMENT, 4.
CARRIERS.
LEASE, 4.

RECEIPT.

See ACTION, 1.

RECEIVER.

For the purpose of preserving the property of a foreign corporation, for the benefit of creditors or stockholders, a court of equity has ample power to take charge of it, and to appoint a receiver. *Murray v. Vanderbilt,* 140

See ACCESSORY TRANSIT COMPANY.
BANKS, 1, 2, 3.

RECOGNIZANCE.

1. A recognizance taken in a criminal case, conditioned that the prisoner shall appear at the next court of oyer and terminer, to answer to an indictment; that he shall "not depart without leave of the court;" and that he shall "abide its order and decision," by its terms requires, substantially, his appearance on the first day of term and *de die in diem* during its continuance, unless discharged by the court. *People v. McCoy,* 73
2. The obligation to appear at the next court of oyer and terminer is not answered by an appearance on the first day of the term, or by appearing and submitting to a partial trial. *ib*
3. The meaning of the condition is not that the prisoner shall simply submit to a trial, but that he shall at all times until surrendered, or ordered into custody, submit himself to the jurisdiction or authority of the court; and that he shall be held to answer during the whole term of the court, and until the trial is ended. *ib*
4. If the prisoner appears in court, answers when called, and without having been surrendered by his bail, or ordered into the custody of the sheriff, enters upon his trial, but before the same is finished he departs from the court without leave, and does not return again to abide the order and decision of the court, his recognizance is forfeited. *ib*
5. Where a recognizance is taken in the proper court of oyer and terminer, and is returnable "at the next court of oyer and terminer," the fair interpretation of the words em-

ployed is that the court of oyer and terminer of the county where the indictment was found, and where it could be tried, and in which the recognizance was taken, is intended, and therefore the recognizance is not void for uncertainty. *ib*

REPLEVIN.

1. It is no defense to an action against sureties in an undertaking given on commencing an action to recover the possession of personal property, under the code, that having been excepted to by the defendant in that action, they failed to justify. *Decker v. Anderson*, 346
2. The defendant's proceeding in the replevin suit, after excepting to the sureties and their failure to justify, and especially his institution of an action upon the undertaking, may be regarded as an election to waive the exception to the sureties, *it seems*. *Per HOGBOOM, J.* *ib*
3. Where the promise, in an undertaking, is to the defendant—to return the property if a return shall be adjudged, and to pay him any judgment he may recover—an action may be brought upon the undertaking, by the defendant, without any assignment thereof to him. *ib*

RIPARIAN OWNERS.

1. Riparian owners have no right to use their privileges in any way to the detriment of a proprietor on the stream below them. Although they have a right to use the water for all legitimate and proper purposes, they are not authorized to injure the owner below them, or in any way to interfere with his privileges. *Honsee v. Hammond*, 89
2. Accordingly, where the owners of a tannery situated upon a stream threw tan-bark and other materials into the stream, thereby clogging the same and causing damage to the mills of the plaintiff situated lower down the stream; *Held* that an action would lie for the injury, even though the damage was done by the defendants without any intent to injure, and in the usual manner in which water is used in tanneries. *ib*

S

SALES.

See TRUSTS AND TRUSTEES, 1, 2.

SET-OFF.

Damages sustained by the makers of a promissory note, in consequence of the breach of an agreement by the payees to apply the proceeds of a consignment of wheat to the payment of such note, cannot be set off nor made the subject of a counter-claim, in an action brought upon a subsequent note, given by the same makers, to the payees of the first, and transferred to the plaintiff after maturity; the first note having been collected, and the second being a new and independent security and resting on a distinct consideration. *Titus v. Himrod*, 581

SEWERS.

See MUNICIPAL CORPORATIONS, 4.

SHERIFF.

1. Where a sheriff neglects to collect and return an execution within the time prescribed by law, he is liable to the plaintiff in the judgment for the damages sustained by his neglect; unless he can show that the defendant in the execution had no property out of which he could have collected the debt. *Bowman v. Cornell*, 69
2. The action against the sheriff, in such a case, is founded upon his neglect to return the execution, and the amount of the execution is the measure of damages. *ib*
3. When a right of action has accrued against a sheriff, for neglecting to return an execution, such right cannot be divested by an appeal being taken from the judgment, by the defendant therein, even though the appeal be brought prior to the commencement of the action. *ib*

STATUTES.

See ARREST.
ATTACHMENT, 2, 3.

See BANKS, 4, 5.
 CONSTITUTIONAL LAW.
 DEBTOR AND CREDITOR, 2, 3.
 GUARDIAN AND WARD, 4, 5.
 JAIL LIMITS, 1.
 MANDAMUS, 10.

STREETS.

In regard to streets and highways, their use is designed for the public, for purposes of passage, travel and locomotion; and the use of them by an individual simply for his own convenience and accommodation unaccompanied by the public uses just mentioned, as for drains, sewers, vaults or cess-pools, is unauthorized and essentially a nuisance, and makes the party building or maintaining such nuisance liable for all damages sustained in consequence of the improper appropriation of the street or highway to such mere personal use. *Wendell v. Mayor &c. of Troy*, 329

See MUNICIPAL CORPORATIONS.

SUPERVISORS.

See NEW YORK (CITY OF.)

SUPREME COURT.

See FOREIGN CORPORATIONS.
 LEASE, 4, 5.
 RECEIVER.

SURROGATE.

A surrogate has no authority to award counsel fees, to be paid out of the estate of a decedent, to both of the contesting parties. He can only give costs to the successful party; and they are to be taxed at common pleas rates; that is, as they existed in 1837. *Lee v. Lee*, 172

T

TAXES AND TAXATION.

1. Where a tax was assessed upon the roll to *Henry D. Van V.*, while the real name of the person intended was *William H. Van V.*, although

he was also known in the town as *Henry Van V.*; *Held* that he was properly charged with the payment of his share of the public taxes by the latter name. *Van Voorhis v. Budd*, 479

2. *Held*, also, that the letter D. between "Henry" and "Van V." upon the tax roll, was to be regarded as surplusage, upon the principle that the law recognizes but one christian name. *ib*

TAX WARRANT.

See TOWN COLLECTOR.

TENANT FOR LIFE.

See DEVISEES.

TITLE.

See PRINCIPAL AND AGENT, 2.

TOLLS.

See PLANK ROADS.

TORT.

Where, in an action for a *tort* in wrongfully taking and converting the plaintiff's property, there is an entire failure of proof that the taking was wrongful or tortious, or that there was any fraudulent intent, the plaintiff should be nonsuited. He cannot, at the close of the case, waive the *tort* and recover as upon a *contract*. *Ransom v. Wetmore* 104

TOWN COLLECTOR.

1. A town collector, on receiving a tax warrant, is *prima facie* chargeable with the amount of money therein directed to be collected by him; and it is incumbent upon him to discharge himself in some one of the modes pointed out by the statute or recognized by the law. *Fake v. Whipple*, 339

2. If he fails to execute the warrant by returning to the county treas-

rer all the sums therein directed to be paid to such treasurer, he is *prima facie* chargeable with the amount of the deficiency; and if the sheriff, on a warrant being issued to him, for that purpose, by the county treasurer, is not able to collect the deficiency out of the collector's property, the sureties in the collector's bond are *prima facie* liable for the debt. *ib*

3. In an action upon the collector's bond, for his default in not paying over to the county treasurer all the moneys directed in the tax warrant to be paid to him, the burthen of proof is upon the defendants to show that the failure to pay arose from the collector's inability to obtain the sum deficient except by compulsory measures, against the tax-payers. *ib*

4. Where the default of the collector is sought to be excused on the ground that the tax warrant was not delivered to him within the time contemplated by law, so as to enable him by compulsory measures to enforce the same against delinquent tax-payers, it is obligatory upon the defendants to show that the default arose from the inability of the collector to collect, by reason of the lapse of the return day of the warrant before he was entitled to institute proceedings for the forcible collection of the taxes. If they fail to do so, the sureties are liable upon the bond. *ib*

5. Sureties, after having executed a bond in which their principal is recited as being collector of the town, and as having received, as such, the assessment roll of the town for the purpose of collecting the taxes therein named, are estopped from denying the fact that he was such collector, *it seems*. *ib*

TREASURY NOTES.

See CONSTITUTIONAL LAW.

TRESPASS.

See PRINCIPAL AND AGENT, 11.

TROVER.

See VENDOR AND PURCHASER, 6.

TRUSTS AND TRUSTEES.

1. It is not true that a sale and conveyance by a trustee, of the trust property, so that he becomes the purchaser himself, is void. Such a sale and conveyance is capable of confirmation by the express act of the *cestui que trust*, by acquiescence, and lapse of time; and a title acquired by a subsequent purchaser in good faith and without notice of the subject conveyed, will be good, without dispute. *Per* BROWN, J. *Johnson v. Bennett*, 237

2. Sales and conveyances of this character are voidable only. They are voidable in the equity courts, at the instance of the *cestuis que trust* alone, not because they are fraudulent, or for inadequacy of price, but upon a rule of morality and policy having reference to human infirmity, which forbids that a man shall act as vendor, for others, and as purchaser, for himself, of the same subject matter and at the same time. *ib*

3. The grounds upon which courts of equity interfere between *cestuis que trust* and trustees and their grantees with notice, affirm the validity and force of the title at law. Otherwise such courts would have no jurisdiction. *ib*

4. Though the trustee may have acted from the best motives, and the sale may have been fairly conducted, and the prices obtained full and ample, yet the courts will open and order a resale if the parties—the *cestuis que trust*—are not satisfied with it, and they make their claim, and their bill is filed within a reasonable time. *ib*

5. A decree vacating a sale of that kind will be upon terms, in regard to the purchase money already paid and perhaps distributed in execution of the trusts, so as to insure justice and equity to all concerned. *ib*

6. A *cestui que trust*, after having assented to a sale made by the trustee, by accepting his share of the

proceeds, cannot maintain ejectment to recover possession of his share of the land, on the ground that the sale was void. *ib*

TURNPIKE ROADS.

See PLANK ROADS.

U

UNDERTAKING.

See REPLEVIN.

UTICA AND SCHENECTADY RAIL ROAD CO.

See RAIL ROAD COMPANIES.

V

VENDOR AND PURCHASER.

1. One in possession of land under a contract to purchase, and entitled to a conveyance upon making the payments required, is virtually the owner, and may maintain an action to recover damages for injuries to his interest in the property, incurred while he was in the actual occupation and possession of the premises. *Honsee v. Hammond*, 89
2. In such an action, evidence of the value of the premises, and of the cost of the buildings erected thereon, is competent for the purpose of showing the situation of the property, and the surrounding circumstances. *ib*
3. In such an action it is entirely competent for the plaintiff to prove the difference in the annual value of the property prior to, and since, the injury alleged, within the rule laid down by the authorities respecting opinions of witnesses. *ib*
4. The difference in the value of the property, at the two periods, is the proper rule of damages. *ib*

5. Goods were sold by G. to B. in New York, to be paid for on delivery at Milwaukee by B.'s acceptance of two drafts for the price, to be drawn on him by G. Before the property reached Milwaukee B. left that place, after instructing his agent to inform G. that he would not receive the same, and to return it to G. if it should arrive. The property reached Milwaukee, and drafts being drawn on B. for the price, they were returned without acceptance. *Held* that no title to the property vested in B., and that he had no interest therein which was subject to levy and sale on execution against him. *Hicks v. Cleveland*, 573

6. *Held*, also, that a sale of the goods by B. to another did not carry a right of action for a previous conversion; and that the purchaser could not maintain trover against the sheriff without a demand. *ib*

See WARRANTY.

W

WARRANT OF ARREST.

See JUSTICE OF THE PEACE.

WARRANTY.

1. In this state, the rule of *caveat emptor* which obtains in the common law, is subject to the exception that a warranty of title in the vendor is implied in a contract of sale. But this exception is limited to cases where the vendor is, at the time, in the possession of the thing sold. The possession of the vendor is the foundation of the implied warranty. *Scranton v. Clark*, 273
2. Where J. made a contract to sell the promissory note of C. to L. when he was not its owner, and it was not in his possession; *Held* that the purchase was at the risk of L.; and the law implied no warranty by J. that he had the title to the note; and that although J. subsequently acquired the title, this did not enure to the benefit of L.,

and render a payment by C. to L. good and effectual, and an extinguishment of the note. *ib*

WATER.

1. The right to have the waters of a stream flow in their natural bed, passes by a conveyance of the adjoining and subjacent soil, as a necessary and inseparable accompaniment or incident to the ownership of such adjoining soil. *Corning v. Troy Iron and Nail Factory*, 311
2. This is as absolute and fixed a right, arising out of the relation of a riparian proprietor to the waters of the stream flowing over and along his lands, as the right to the soil itself; and is never separated or disconnected from the land until the right itself becomes extinguished by twenty years adverse possession. *ib*
3. The right to the water is a natural, permanent and inseparable incident or accompaniment to the ownership of the soil, and is incapable of being divested by the act of any wrongdoer, until twenty years adverse enjoyment have ripened the original wrong into a legal right. *ib*
4. The most unquestionable evidence of the intentions of the parties to the contrary, is requisite, to justify the inference that such water-right was not designed to be conveyed with the land. *ib*
5. In order to estop the owner of a water right, in equity, from enforcing his right, on the ground of his knowledge of, and acquiescence in the making of expenditures and improvements thereon, by another, the consent and agreement of such owner thereto ought to be established by the clearest and most satisfactory evidence. *ib*
6. Where a lessee, under a lease having thirteen or fourteen years yet to run, diverted a water-course, and made large expenditures and improvements thereon; *Held* that such diversion would not be presumed to have been intended to be perpetual or permanent, or extending beyond the duration of the term, so as to

require a protest on the part of the owner of the land, under the penalty of being estopped in equity from afterwards objecting. *ib*

See DAMS. EQUITY.

WILL.

1. Construction of.

1. A testator directed the residue of his estate to be divided between his brother William, and the children of his deceased sister Ellen, and the daughter of his brother John, in equal proportions, share and share alike. *Held* that a decree of the surrogate, directing a distribution to be made among the legatees *per capita*, giving each of the nephews and nieces an equal share with the brother of the testator, applied the correct rule of distribution. *Lee v. Lee*, 172
2. A testator, by the third clause of his will, ordered and empowered his executors to sell all the rest of his real estate whatsoever, &c., and declared that all his real estate, except, &c., should be considered as absolutely converted into personal estate from the time of his decease, and should be sold and converted into money, for the sake of a more easy division among those thereafter named; and that when so sold and converted into money, it should, together with the residue of his personal property, be disposed of, held, divided and distributed as thereafter mentioned. By the 6th clause all his real estate, except &c., was devised to his two daughters, H. and S. each one quarter, one quarter to the children of a deceased daughter, L., and one quarter to the children of R., another deceased daughter; subject to the power of sale and to the possession and control of the executors until sold, and to be treated as personal property from the time of the testator's decease, and not subject to partition or division until sold and converted into money. *Held* that the real estate was by the will converted into personalty from the death of the testator. *Irish v. Huested*, 411

3. And that, considered as personalty, the share of one of the daughters, who was a married woman, would be and remain her sole and separate property, not subject to her husband's control during her life, and within her absolute power of disposal by will. *ib*
4. That if she did not see fit to dispose of it by will, the provisions of the revised statutes (3 R. S. 5th ed. 185, sec. 86) would attach to it upon her death, and thereby the husband would become the absolute owner of it. *ib*
5. The testator further directed, in the same will, that in case either of his daughters should die without lawful issue, the part or share of her so dying should go to her surviving sister, and the children of his already deceased daughters, to be divided among the latter *per stirpes* and not *per capita*; and if either or any of the children of the deceased daughters should die without lawful issue, the survivor or survivors should receive the share or shares of the deceased. *Held* that although there was a *manifest intent* clearly inferrible from the tenor of the will, that the real estate should go to the use of the testator's children and grandchildren, such interest could not be held to stand in lieu of a *limitation over* to the children of S., one of his daughters, after her death, if she should die leaving children. *ib*

2. Validity.

6. The apparent injustice of a testator to members of his family, although evidence to be taken into consideration in examining the question of the testator's soundness of mind, at the time of executing a will, is only a circumstance; and it seems has never been regarded as sufficient, alone, to invalidate the will. *Gamble v. Gamble*, 373

3. Execution of.

7. A testator, being in the same room, with W. and K., took up his will,

which was not yet signed, and turning to W. and K. and calling each of them by name, said: "That is my last will and testament." He then took a pen and wrote his name to it. W. then took the paper from the table and subscribed his name to it, and handed it to K. who signed his name to it. *Held* that the directions of the statute were complied with, notwithstanding the declaration was made *before* the testator had signed the will, instead of afterwards. *Gamble v. Gamble*, 373

8. The attendance of W. had been procured by the testator for the purpose as well to be a witness to his will as to write it, and the attendance of K. had been procured for the sole purpose of his becoming a subscribing witness. They were in the same room with the testator, and sitting at the same table, at the time he subscribed the will. After he had signed it he handed it to W., who subscribed it as a witness, in his presence, and handed it to K. who also signed the attestation clause; the testator telling the latter he must name the town and county he lived in. *Held* that there was a sufficient request to the witness; the testator's desire that they should subscribe the will as witnesses being unmistakably manifested, at the time, by his acts and declarations. *ib*

See EQUITABLE CONVERSION.

WITNESS.

1. Representatives of a deceased person are real or personal; the former being the heirs at law, and the latter, ordinarily, the executors or administrators. The term "representatives" includes both classes. *Lee v. Dill*, 516; *contra*, *Hempstead v. Hallenbeck*, 79
2. There is no reason in the language of section 399 of the code as amended in 1860, the grounds of the exception therein, or the situation and condition of parties, authorizing a distinction between the different classes of representatives

of a deceased person, in construing, applying and carrying into effect the provision of law contained in that section. *ib*

3. Accordingly *held*, that upon an issue at law between the heir at law and the devisee, of a decedent, as to the due execution of a will by the decedent, and as to his compe-

tency to execute the same; the question being between those two claimants, which is the best entitled to the property, the one by descent, or the other by purchase; the devisee is not a competent witness to testify to transactions between the testator and himself, tending to establish the will. BACON, J. dissented. *ib*

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